

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT 9

GENERAL CIGAR COMPANY, INC., a
corporation,

Plaintiff in Error,

vs.

FIRST NATIONAL BANK OF PORT-
LAND, Oregon, a National Banking cor-
poration,

Defendant in Error.

TRANSCRIPT OF RECORD

On Writ of Error to the District Court of the United
States, for the District of Oregon, Honorable
Charles E. Wolverton, District Judge.

FILED
DEC 26 1922
F. A. MONOKTON,
CLERK

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(In conformity with stipulation of counsel printed at page 159 of this Transcript, the caption, titles, clerk's endorsements, and other formal matters appearing in the original papers, not material to this hearing, are omitted therefrom.)

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No.....

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FIRST NATIONAL BANK OF PORT-
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TRANSCRIPT OF RECORD

On Writ of Error to the District Court of the United
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Charles E. Wolverton, District Judge.

IN THE DISTRICT COURT OF THE UNITED
STATES, FOR THE DISTRICT
OF OREGON

GENERAL CIGAR COMPANY, INC., a corporation,	} Plaintiff in Error,
vs.	
FIRST NATIONAL BANK OF PORT- LAND, Oregon, a National Banking cor- poration,	
	} Defendant in Error.

BE IT REMEMBERED, that on the 7th day of November, 1921, there was filed in the above entitled court and cause the following

COMPLAINT.

Comes now the plaintiff in the above entitled court and cause, and for its first cause of action against the above named defendant complains and alleges:

I.

That plaintiff now is, and at all times herein mentioned was, a corporation duly organized, incorporated and existing under and by virtue of the laws of the State of New York, with its principal office in said state, and it now is, and at said times was, a citizen of said state; that it now is, and at all times herein mentioned has been, duly licensed, authorized and empowered to transact business as a foreign corporation in the State

of Oregon, having complied with the requirements of said state with reference to foreign corporations, filed its Articles of Incorporation therein, designated a Statutory Agent for the service of process, and paid its license fees.

II.

That defendant now is, and at all times herein mentioned was, a national banking corporation organized under the laws of the United States with its principal place of business in the City of Portland, Oregon, and is a citizen of, and resides in, said State.

III.

That the matter involved in this action exceeds in amount, exclusive of interest and costs, \$3000.00.

IV.

That on or about December 13, 1919, plaintiff at Spokane, Washington, through its agents engaged in conducting plaintiff's business branch in said city and state, drew its check, being No. 397, on the Spokane & Eastern Trust Company, a banking corporation of Spokane, Washington, payable to itself in the amount of \$1,293.58; that said check was transmitted in the usual course of business by plaintiff's said Spokane branch to plaintiff's Portland branch; that said check was received by plaintiff's agents conducting plaintiff's business at Portland, Oregon, and the same was endorsed

for the purpose of deposit by rubber stamp endorsement on the back thereof as follows:

Pay to the Order of
 First National Bank
 335 Portland, Ore. 335
 General Cigar Co., Inc.
 M. A. Gunst Branch
 M. A. Gunst & Co.

that said special endorsement above set forth was one uniformly and continuously theretofore used by the plaintiff for purposes of deposit in the defendant Bank, and was in the form prescribed and recommended by said defendant Bank, and by the Portland Clearing House Association, of which said defendant Bank was at all times herein mentioned a member, as the form to be used for purposes of deposit.

V.

That thereafter one N. W. Turrell, wrongfully and without authority from plaintiff, took and converted to his own use said check endorsed as above stated, and on or about December 15, 1919, wrongfully and without authority from plaintiff, transferred said check to the defendant; that thereafter on or about December 18, 1919, defendant presented said check to the bank on which the same was drawn, and said drawee bank paid said defendant the face amount of said check, to-wit: the sum of \$1,293.58, and on the date of said payment charged said sum to plaintiff's account at said drawee

bank, and said sum has ever since remained charged to plaintiff's said account; that defendant has at no time paid plaintiff, or credited plaintiff's account with, any sums whatever on account of said check or the proceeds thereof.

VI.

That by reason of the matters and things aforesaid defendant did on or about said December 18, 1919, receive said sum of \$1,293.58 for plaintiff's use and to which plaintiff was, and is, entitled in right and justice, and defendant did on said date become justly indebted to plaintiff in said sum of \$1,293.58, which sum and no part thereof has been paid plaintiff by defendant although the same has been often demanded, and defendant has, by its letter of August 20, 1921, refused to pay said sum or any part thereof.

Plaintiff for its second cause of action against said defendant alleges:

I.

Realleges the matter contained in Paragraph I of plaintiff's first cause of action herein.

II.

Realleges the matter contained in Paragraph II of plaintiff's first cause of action herein.

III.

Realleges the matter contained in Paragraph III of

plaintiff's first cause of action herein.

IV.

That on or about January 17, 1920, plaintiff at Seattle, Washington, through its agents engaged in conducting plaintiff's business branch in said city and state drew its check, being No. G.25, on the Union National Bank, a banking corporation of Seattle, Washington, payable to itself in the amount of \$467.13; that said check was transmitted in the usual course of business by plaintiff's said Seattle branch to plaintiff's Portland branch; that said check was received by plaintiff's agents conducting plaintiff's business at Portland, Oregon, and the same was endorsed for the purpose of deposit by rubber stamp endorsement on the back thereof as follows:

Pay to the Order of
First National Bank
335 Portland, Ore. 335
General Cigar Co., Inc.
M. A. Gunst Branch
M. A. Gunst & Co.

that said special endorsement above set forth was one uniformly and continuously theretofore used by the plaintiff for purposes of deposit in the defendant Bank, and was in the form prescribed and recommended by said defendant Bank, and by the Portland Clearing House Association, of which said defendant Bank was

at all times herein mentioned a member, as the form to be used for purposes of deposit.

V.

That thereafter one N. W. Turrell wrongfully and without authority from plaintiff, took and converted to his own use said check endorsed as above stated, and on or about January 20, 1920, wrongfully and without authority from plaintiff, transferred said check to the defendant; that thereafter on or about January 22, 1920, defendant presented said check to the bank on which the same was drawn, and said drawee bank paid said defendant the face amount of said check, to-wit: the sum of \$467.13, and on the date of said payment charged said sum to plaintiff's account at said drawee bank, and said sum has ever since remained charged to plaintiff's said account; that defendant has at no time paid plaintiff, or credited plaintiff's account with, any sums whatever on account of said check or the proceeds thereof.

VI.

That by reason of the matters and things aforesaid defendant did on or about said January 22, 1920, receive said sum of \$467.13 for plaintiff's use and to which plaintiff was, and is, entitled in right and justice, and defendant did on said date become justly indebted to plaintiff in said sum of \$467.13, which sum and no part thereof has been paid plaintiff by defendant although the same has been often demanded, and defendant has,

by its letter of August 20, 1921, refused to pay said sum or any part thereof.

Plaintiff for its third cause of action against said defendant alleges:

I.

Realleges the matter contained in Paragraph I of plaintiff's first cause of action herein.

II.

Realleges the matter contained in Paragraph II of plaintiff's first cause of action herein.

III.

Realleges the matter contained in Paragraph III of plaintiff's first cause of action herein.

IV.

That on or about January 28, 1920, plaintiff at Seattle, Washington, through its agents engaged in conducting plaintiff's business branch in said city and state, drew its check, being No. G.46, on the Union National Bank, a banking corporation of Seattle, Washington, payable to itself in the amount of \$2,334.01; that said check was transmitted in the usual course of business by plaintiff's said Seattle branch to plaintiff's Portland branch; that said check was received by plaintiff's agents conducting plaintiff's business at Portland, Oregon, and the same was endorsed for the purpose of deposit by rubber stamp endorsement on the back thereof as follows:

Pay to the Order of
First National Bank
335 Portland, Ore. 335
General Cigar Co., Inc.
M. A. Gunst Branch
M. A. Gunst & Co.

that said special endorsement above set forth was one uniformly and continuously theretofore used by the plaintiff for purposes of deposit in the defendant Bank, and was in the form prescribed and recommended by said defendant Bank, and by the Portland Clearing House Association, of which said defendant Bank was at all times herein mentioned a member, as to the form to be used for purposes of deposit.

V.

That thereafter one N. W. Turrell wrongfully and without authority from plaintiff, took and converted to his own use said check endorsed as above stated, and on or about January 31, 1920, wrongfully and without authority from plaintiff, transferred said check to the defendant; that thereafter on or about February 2, 1920, defendant presented said check to the bank on which the same was drawn, and said drawee bank paid said defendant the face amount of said check, to-wit: the sum of \$2,334.01, and on the date of said payment charged said sum to plaintiff's account at said drawee bank, and said sum has ever since remained charged to plaintiff's said account; that defendant has at no time

paid plaintiff, or credited plaintiff's account with, any sums whatever on account of said check or the proceeds thereof.

VI.

That by reason of the matters and things aforesaid defendant did on or about said February 2, 1920, receive said sum of \$2,334.01 for plaintiff's use and to which plaintiff was, and is, entitled in right and justice, and defendant did on said date become justly indebted to plaintiff in said sum of \$2,334.01, which sum and no part thereof has been paid plaintiff by defendant although the same has been often demanded, and defendant has, by its letter of August 20, 1921, refused to pay said sum or any part thereof.

Plaintiff for its fourth cause of action against said defendant alleges:

I.

Realleges the matter contained in Paragraph I of plaintiff's first cause of action herein.

II.

Realleges the matter contained in Paragraph II of plaintiff's first cause of action herein.

III.

Realleges the matter contained in Paragraph III of plaintiff's first cause of action herein.

IV.

That on or about March 10, 1920, plaintiff at Spokane, Washington, through its agents engaged in conducting plaintiff's business branch in said city and state, drew its check, being No. G.120, on the Spokane & Eastern Trust Company, a banking corporation of Spokane, Washington, payable to itself in the amount of \$160.94; that said check was transmitted in the usual course of business by plaintiff's said Spokane branch to plaintiff's Portland branch; that said check was received by plaintiff's agents conducting plaintiff's business at Portland, Oregon, and the same was endorsed for the purpose of deposit by rubber stamp endorsement on the back thereof as follows:

Pay to the Order of
First National Bank
335 Portland, Ore. 355
General Cigar Co., Inc.
M. A. Gunst Branch
M. A. Gunst & Co.

that said special endorsement above set forth was one uniformly and continuously theretofore used by the plaintiff for purposes of deposit in the defendant Bank, and was in the form prescribed and recommended by said defendant Bank, and by the Portland Clearing House Association, of which said defendant Bank was at all times herein mentioned a member, as the form to be used for purposes of deposit.

IV.

That thereafter one N. W. Turrell wrongfully and without authority from plaintiff, took and converted to his own free use said check endorsed as above stated, and on or about March 16, 1920, wrongfully and without authority from plaintiff, transferred said check to the defendant; that thereafter on or about March 18, 1920 defendant presented said check to the bank on which the same was drawn, and said drawee bank paid said defendant the face amount of said check, to-wit: the sum of \$160.94, and on the date of said payment charged said sum to plaintiff's account at said drawee bank, and said sum has ever since remained charged to plaintiff's said account; that defendant has at no time paid plaintiff, or credited plaintiff's account with, any sums whatever on account of said check or the proceeds thereof.

VI.

That by reason of the matters and things aforesaid defendant did on or about March 18, 1920, receive said sum of \$160.94 for plaintiff's use and to which plaintiff was, and is entitled in right and justice, and defendant did on said date become justly indebted to plaintiff in said sum of \$160.94, which sum and no part thereof has been paid plaintiff by defendant although the same has been often demanded, and defendant has, by its letter of August 20, 1921, refused to pay said sum or any part thereof.

Plaintiff for its fifth cause of action against said defendant alleges:

I.

Realleges the matter contained in Paragraph I of Plaintiff's first cause of action herein.

II.

Realleges the matter contained in Paragraph II of plaintiff's first cause of action herein.

IV.

That on or about March 29, 1920, plaintiff at Spokane, Washington, through its agents engaged in conducting plaintiff's business branch in said city and state, drew its check, being No. G.170, on the Spokane & Eastern Trust Company, a banking corporation of Spokane, Washington, payable to itself in the amount of \$998.53; that said check was transmitted in the usual course of business by plaintiff's said Spokane branch to plaintiff's agents conducting plaintiff's business at Portland, Oregon, and the same was endorsed for the purpose of deposit by rubber stamp endorsement on the back thereof as follows:

Pay to the Order of
First National Bank
335 Portland, Ore. 355
General Cigar Co., Inc.
M. A. Gunst Branch
M. A. Gunst & Co.

that said special endorsement above set forth was one uniformly and continuously theretofore used by the

plaintiff for purposes of deposit in the defendant Bank, and was in the form prescribed and recommended by said defendant Bank, and by the Portland Clearing House Association, of which said defendant Bank was at all times herein mentioned a member, as the form to be used for purposes of deposit.

V.

That thereafter one N. W. Turrell wrongfully and without authority from plaintiff, took and converted to his own use said check endorsed as above stated, and on or about April 2, 1920, wrongfully and without authority from plaintiff, transferred said check to the defendant; that thereafter on or about April 5, 1920, defendant presented said check to the bank on which the same was drawn, and said drawee bank paid said defendant the face amount of said check, to-wit: the sum of \$998.53, and on the date of said payment charged said sum to plaintiff's account at said drawee bank, and said sum has ever since remained charged to plaintiff's said account; that defendant has at no time paid plaintiff, or credited plaintiff's account with, any sums whatever on account of said check or the proceeds thereof.

VI.

That by reason of the matters and things aforesaid defendant did on or about said April 5, 1920, receive said sum of \$998.53 for plaintiff's use and to which plaintiff was, and is, entitled in right and justice, and

defendant did on said date become justly indebted to plaintiff in said sum of \$998.53, which sum and no part thereof has been paid plaintiff by defendant although the same has been often demanded, and defendant has, by its letter of August 20, 1921, refused to pay said sum or any part thereof.

Plaintiff for its sixth cause of action against said defendant alleges:

I.

Realleges the matter contained in Paragraph I of plaintiff's first cause of action herein.

II.

Realleges the matter contained in Paragraph II of plaintiff's first cause of action herein.

III.

Realleges the matter contained in Paragraph III of plaintiff's first cause of action herein.

IV.

That on or about April 26, 1920, plaintiff at Seattle, Washington, through its agents engaged in conducting plaintiff's business branch in said city and state, drew its check, being No. G.286, on the Union National Bank, a banking corporation of Seattle, Washington, payable to itself in the amount of \$713.49; that said check was transmitted in the usual course of business

by plaintiff's said Seattle branch to plaintiff's Portland branch; that said check was received by plaintiff's agents conducting plaintiff's business at Portland, Oregon, and the same was endorsed for the purpose of deposit by rubber stamp endorsement on the back thereof as follows:

Pay to the Order of
First National Bank
355 Portland, Ore. 355
General Cigar Co., Inc.
M. A. Gunst Branch
M. A. Gunst & Co.

that said special endorsement above set forth was one uniformly and continuously theretofore used by the plaintiff for purposes of deposit in the defendant Bank, and was in the form prescribed and recommended by said defendant Bank, and by the Portland Clearing House Association, of which said defendant Bank was at all times herein mentioned a member, as the form to be used for purposes of deposit.

V.

That thereafter one N. W. Turrell wrongfully and without authority from plaintiff, took and converted to his own use said check endorsed as above stated, and on or about April 27, 1920, wrongfully and without authority from plaintiff, transferred said check to the defendant; that thereafter on or about April 28, 1920, defendant presented said check to the bank on which

the same was drawn, and said drawee bank paid said defendant the face amount of said check, to-wit: the sum of \$713.49, and on the date of said payment charged said sum to plaintiff's account at said drawee bank, and said sum has ever since remained charged to plaintiff's said account; that defendant has at no time paid plaintiff, or credited plaintiff's account with, any sums whatever on account of said check or the proceeds thereof.

VI.

That by reason of the matters and things aforesaid defendant did on or about said April 28, 1920, receive said sum of \$713.49 for plaintiff's use and to which plaintiff was, and is, entitled in right and justice, and defendant did on said date become justly indebted to plaintiff in said sum of \$713.49, which sum and no part thereof has been paid plaintiff by defendant although the same has been often demanded, and defendant has, by its letter of August 20, 1921, refused to pay said sum or any part thereof.

* * * *

Plaintiff for its ninth cause of action against said defendant alleges:

I.

Realleges the matter contained in Paragraph I of plaintiff's first cause of action herein.

II.

Realleges the matter contained in Paragraph II of plaintiff's first cause of action herein.

III.

Realleges the matter contained in Paragraph III of plaintiff's first cause of action herein.

IV.

That on or about November 10, 1920, plaintiff at Spokane, Washington, through its agents engaged in conducting plaintiff's business branch in said city and state, drew its check, being No. G.799, on the Spokane & Eastern Trust Company, a banking corporation of Spokane, Washington, payable to itself in the amount of \$1,005.96; that said check was transmitted in the usual course of business by plaintiff's said Spokane branch to plaintiff's Portland branch; that said check was received by plaintiff's agents conducting plaintiff's business at Portland, Oregon, and the same was endorsed for the purpose of deposit by rubber stamp endorsement on the back thereof as follows:

Pay to the Order of
First National Bank
355 Portland, Ore. 355
General Cigar Co., Inc.
M. A. Gunst Branch
M. A. Gunst & Co.

that said special endorsement above set forth was one

uniformly and continuously theretofore used by the plaintiff for purposes of deposit in the defendant Bank, and was in the form prescribed and recommended by said defendant Bank, and by the Portland Clearing House Association, of which said defendant Bank was at all times herein mentioned a member, as the form to be used for purposes of deposit.

V.

That thereafter one N. W. Turrell wrongfully and without authority from plaintiff, took and converted to his own use said check endorsed as above stated, and on or about November 15, 1920, wrongfully and without authority from plaintiff, transferred said check to the defendant; that thereafter on or about November 16, 1920, defendant presented said check to the bank on which the same was drawn, and said drawee bank paid said defendant the face amount of said check, to-wit: the sum of \$1,005.96, and on the date of said payment charged said sum to plaintiff's account at said drawee bank, and said sum has ever since remained charged to plaintiff's said account; that defendant has at no time paid plaintiff, or credited plaintiff's account with, any sums whatever on account of said check or the proceeds thereof.

VI.

That by reason of the matters and things aforesaid defendant did on or about said November 16, 1920, receive said sum of \$1,005.96 for plaintiff's use and to

which plaintiff was, and is, entitled in right and justice, and defendant did on said date become justly indebted to plaintiff in said sum of \$1,005.96, which sum and no part thereof has been paid plaintiff by defendant although the same has been often demanded, and defendant has, by its letter of August 20, 1921, refused to pay said sum or any part thereof.

Plaintiff for its tenth cause of action against said defendant alleges:

I.

Realleges the matter contained in Paragraph I of plaintiff's first cause of action herein.

II.

Realleges the matter contained in Paragraph II of plaintiff's first cause of action herein.

III.

Realleges the matter contained in Paragraph III of plaintiff's first cause of action herein.

IV.

That on or about November 10, 1920, plaintiff at Seattle, Washington, through its agents engaged in conducting plaintiff's business branch in said city and state, drew its check, being No. G.624, on the Union National Bank, a banking corporation of Seattle, Washington, payable to itself in the amount of \$1,963.09; that said

check was transmitted in the usual course of business by plaintiff's said Seattle branch to plaintiff's Portland branch; that said check was received by plaintiff's agents conducting plaintiff's business at Portland, Oregon, and the same was endorsed for the purpose of deposit by rubber stamp endorsement on the back thereof as follows:

Pay to the Order of
First National Bank
335 Portland, Ore. 355
General Cigar Co., Inc.
M. A. Gunst Co., Inc.
M. A. Gunst & Co.

that said special endorsement above set forth was one uniformly and continuously theretofore used by the plaintiff for purposes of deposit in the defendant Bank, and was in the form prescribed and recommended by said defendant Bank, and by the Portland Clearing House Association, of which said defendant Bank was at all times herein mentioned a member, as the form to be used for purposes of deposit.

V.

That thereafter one N. W. Turrell wrongfully and without authority from plaintiff, took and converted to his own use said check endorsed as above stated, and on or about November 13, 1920, wrongfully and without authority from plaintiff, transferred said check to the defendant; that thereafter on or about November 16,

1920, defendant presented said check to the bank on which the same was drawn, and said drawee bank paid said defendant the face amount of said check, to-wit: the sum of \$1,963.09, and on the date of said payment charged said sum to plaintiff's account at said drawee bank, and said sum has ever since remained charged to plaintiff's said account; that defendant has at no time paid plaintiff, or credited plaintiff's account with, any sums whatever on account of said check or the proceeds thereof.

VI.

That by reason of the matters and things aforesaid defendant did on or about said November 16, 1920, receive said sum of \$1,963.09 for plaintiff's use and to which plaintiff was, and is, entitled in right and justice, and defendant did on said date become justly indebted to plaintiff in said sum of \$1,963.09, which sum and no part thereof has been paid plaintiff by defendant although the same has been often demanded, and defendant has, by its letter of August 20, 1921, refused to pay said sum or any part thereof.

Plaintiff for its eleventh cause of action against said defendant alleges:

I.

Realleges the matter contained in Paragraph I of plaintiff's first cause of action herein.

II.

Realleges the matter contained in Paragraph II of plaintiff's first cause of action herein.

III.

Realleges the matter contained in Paragraph III of plaintiff's first cause of action herein.

IV.

That on or about November 26, 1920, plaintiff at Seattle, Washington, through its agents engaged in conducting plaintiff's business branch in said city and state, drew its check, on the Union National Bank, a banking corporation of Seattle, Washington, payable to itself in the amount of \$1,140.85; that said check was transmitted in the usual course of business by plaintiff's said Seattle branch to plaintiff's Portland branch; that said check was received by plaintiff's agents conducting plaintiff's business at Portland, Oregon, and the same was endorsed on the back thereof as follows:

Pay to the Order of
First National Bank
335 Portland, Ore. 335
General Cigar Co., Inc.
M. A. Gunst Branch
M. A. Gunst & Co.

that said special endorsement above set forth was one uniformly and continuously theretofore used by the plaintiff for purposes of deposit in the defendant Bank, and was in the form prescribed and recommended by said

defendant Bank, and by the Portland Clearing House Association, of which said defendant Bank was at all times herein mentioned a member, as the form to be used for purposes of deposit.

V.

That thereafter one N. W. Turrell wrongfully and without authority from plaintiff, took and converted to his own use said check endorsed as above stated, and on or about December 2, 1920, wrongfully and without authority from plaintiff, transferred said check to the defendant; that thereafter on or about December 3, 1920, defendant presented said check to the bank on which the same was drawn, and said drawee bank paid said defendant the face amount of said check, to-wit: the sum of \$1140.85, and on the date of said payment charged said sum to plaintiff's account at said drawee bank, and said sum has ever since remained charged to plaintiff's said account; that defendant has at no time paid plaintiff, or credited plaintiff's account with, any sums whatever on account of said check or the proceeds thereof.

VI.

That by reason of the matters and things aforesaid defendant did on or about said December 3, 1920, receive said sum of \$1,140.85 for plaintiff's use and to which plaintiff was, and is, entitled in right and justice, and defendant did on said date become justly indebted to plaintiff in said sum of \$1,140.85, which sum and

no part thereof has been paid plaintiff by defendant although the same has been often demanded, and defendant has, by its letter of August 20, 1921, refused to pay said sum or any part thereof.

WHEREFORE plaintiff demands that it do have and recover judgment of and from said defendant in the sum of \$1,293.58, with interest thereon at the rate of 6% per annum from December 18, 1919; in the further sum of \$467.13 with interest thereon at the rate of 6% per annum from January 22, 1920; in the further sum of \$2,334.01 with interest thereon at the rate of 6% per annum from February 2, 1920; in the further sum of \$160.94 with interest thereon at the rate of 6% per annum from March 18, 1920; in the further sum of \$998.53 with interest thereon at the rate of 6% per annum from April 9, 1920; in the further sum of \$713.49 with interest thereon at the rate of 6% per annum from April 28, 1920;

* * * *

in the further sum of \$1,005.96 with interest thereon at the rate of 6% per annum from November 16, 1920; in the further sum of \$1,963.09 with interest thereon at the rate of 6% per annum from November 16, 1920; and in the further sum of \$1,140.85 with interest thereon at the rate of 6% per annum from December 3, 1920, and for its costs and disbursements herein.

DEY, HAMPSON & NELSON,
GEO. L. BULAND,

Attorneys for Plaintiff.

(The seventh and eighth causes of action are here omitted pursuant to Stipulation hereinafter appearing, for the reason that said causes of action were dismissed by Plaintiff with the consent of Defendant prior to trial.)

On December 29th, 1921, there was filed to said Complaint, the following Demurrer.

Comes now the Defendant above named and demurs to all that portion of Plaintiff's Complaint designated as Plaintiff's first cause of action, for the reason that said portion does not state a cause of action against the Defendant upon which this Plaintiff can recover.

II.

Demurs to all that portion of Plaintiff's Complaint designated as Plaintiff's second cause of action, for the reason that said portion does not state a cause of action against the Defendant upon which this Plaintiff can recover.

III.

Demurs to all that portion of Plaintiff's Complaint designated as Plaintiff's third cause of action, for the reason that said portion does not state a cause of action against the Defendant upon which this Plaintiff can recover.

IV.

Demurs to all that portion of Plaintiff's Complaint designated as Plaintiff's fourth cause of action, for the

reason that said portion does not state a cause of action against the Defendant upon which this Plaintiff can recover.

V.

Demurs to all that portion of Plaintiff's Complaint designated as Plaintiff's fifth cause of action, for the reason that said portion does not state a cause of action against the Defendant upon which this Plaintiff can recover.

VI.

Demurs to all that portion of Plaintiff's Complaint designated as Plaintiff's sixth cause of action, for the reason that said portion does not state a cause of action, against this Defendant upon which this Plaintiff can recover.

VII.

Demurs to all that portion of Plaintiff's Complaint designated as Plaintiff's seventh cause of action, for the reason that said portion does not state a cause of action against this Defendant upon which this Plaintiff can recover.

VIII.

Demurs to all that portion of Plaintiff's Complaint designated as Plaintiff's eighth cause of action, for the reason that said portion does not state a cause of action

against this Defendant upon which this Plaintiff can recover.

IX.

Demurs to all that portion of Plaintiff's Complaint designated as Plaintiff's ninth cause of action, for the reason that said portion does not state a cause of action against this Defendant upon which this Plaintiff can recover.

X.

Demurs to all that portion of Plaintiff's Complaint designated as Plaintiff's tenth cause of action, for the reason that said portion does not state a cause of action against this Defendant upon which this Plaintiff can recover.

XI.

Demurs to all that portion of Plaintiff's Complaint designated as Plaintiff's eleventh cause of action, for the reason that said portion does not state a cause of action against this Defendant upon which this Plaintiff can recover.

XIII.

Demurs to Plaintiff's Complaint herein for the reason that said Complaint does not state facts sufficient to constitute cause of action against this Defendant.

DOLPH, MALLORY, SIMON & GEARIN
and EDGAR FREED,

Attorneys for Plaintiff.

I, Edgar Freed, hereby certify that I am one of the Attorneys for the Defendant in the above entitled action, and that in my opinion the foregoing Demurrer is well founded.

EDGAR FREED.

That thereafter, on December 19, 1921, there was rendered on said Demurrer, by Honorable Robert S. Bean, Judge of said Court, the following

OPINION

This is an action to recover for money had and received and submitted on the demurrer to the complaint, from which it appears that the plaintiff is engaged in business at Spokane, Seattle and Portland. The Spokane and Seattle branches drew drafts on their local bank payable to the plaintiff, transmitted the same to the Portland branch, where the drafts were regularly endorsed as follows: "Pay to the order of the First National Bank, Portland, Oregon," and that that such endorsements were in form uniformly and continuously used by the plaintiff for the purposes of deposit in the defendant bank and was the form prescribed and required by the bank and by the Portland Clearing House.

After the drafts had been thus endorsed one Turrell, without authority from plaintiff, wrongfully took possession of the drafts and converted them to his own use, and wrongfully and unlawfully delivered them to the defendant bank, and defendant thereafter presented them, or caused them to be presented to the drawee and they were paid and the defendant bank refused to either

give the plaintiff credit for the amount of the draft or pay the money over to it.

The defendant claims that the plaintiff's remedy in this case is against the drawee bank and not against it. It is argued that because the checks, although specially endorsed to the defendant, were delivered to it by someone not authorized to make such delivery, that the payment by the drawee bank was wrong. But these checks were regularly endorsed by the plaintiff to the defendant bank and was by it presented for payment and paid by the drawee banks in the due course of business, and it seems to me that regardless of the manner in which the checks came into the possession of the defendant bank, that since they were endorsed to it the drawee bank was justified in paying to the holder of the check. The endorsement is not a forgery, but a genuine endorsement, and a special endorsement making the checks payable to the defendant bank, and defendant having presented it and collected the money thereon, it thus received money belonging to the plaintiff and in my judgment should account to it for it.

The demurrer will be overruled.
and Order was duly entered in the Journal of said court, overruling said Demurrer.

That thereafter, on January 3, 1922, there was served and filed the following

ANSWER

(Pursuant to the Stipulation of parties hereinafter appearing, the Defendant's answers to Plaintiff's

first cause of action only are herein printed. The answers to the remaining causes of action contain the same denials, admissions and affirmative allegations as the answers to the first cause of action, the only variations being those rendered appropriate by reason of the difference in dates and amounts of the checks concerned in the various causes of action.)

Comes now the Defendant, the First National Bank of Portland, and for Answer to the first cause of action set out in Plaintiff's Complaint herein, admits, denies and alleges as follows:

I.

Admits all the allegations in Paragraphs I, II and III of said first cause of action.

II.

Denies each and every allegation of Paragraph IV of said first cause of action, except as the same is hereinafter admitted.

III.

Denies each and every allegation of Paragraph V of said first cause of action, except as the same is hereinafter admitted.

IV.

Denies each and every allegation in Paragraph VI of said first cause of action.

And this Defendant for a first, further and separate defense herein to said first cause of action, alleges:

I.

That on the 23rd day of July, 1919, and for a long time prior thereto, Plaintiff was and ever since said time has been engaged in business in the City of Portland, Oregon; that during all of said time Plaintiff had three separate accounts in this Defendant's Bank, which accounts were designated: first, "General Cigar Co., Inc.—Regular Account"; second, "General Cigar Co., Inc.—Special Account"; third, "General Cigar Co., Inc.—Special Account Benson Hotel Cigar Stand," and which accounts were designated: first, "General Cigar out or otherwise withdrawn by Plaintiff, or its duly authorized agents.

II.

That on the 23rd day of July, 1919, the Plaintiff in writing duly authorized Julius Louisson and N. W. Turrell, or either of them, to demand and receive from the Defendant, and authorized the Defendant to pay to said Julius Louisson and N. W. Turrell, or either of them, any moneys which the Plaintiff had in the Defendant's bank under any of the accounts above-enumerated.

III.

That said several authorizations—in effect powers of attorney—to said N. W. Turrell were in full force and

effect on the 15th day of December, 1919, and on said day said N. W. Turrell was the agent of the Plaintiff, fully authorized to demand and receive from Defendant all moneys in Defendant's bank standing in the name of, or belonging to Plaintiff, or in either of said several accounts.

IV.

That on the 13th day of December, 1919, Plaintiff, at Spokane, Washington, drew its check No. 397 for \$1293.58 on the Spokane & Eastern Trust Company, a banking corporation, of Spokane, Washington, payable to itself, and sent said check to Portland, Oregon, where it was received by the Plaintiff's agent and representative N. W. Turrell; that said N. W. Turrell on behalf of and as the act of the Plaintiff, thereupon endorsed said check as follows:

Pay to the Order of
First National Bank
335 Portland, Ore. 335
General Cigar Co., Inc.
M. A. Gunst Branch,
M. A. Gunst & Co.

which was the customary form used by said N. W. Turrell and by the Plaintiff in endorsing checks either for payment or deposit. That said N. W. Turrell was fully authorized by Plaintiff to so endorse said check.

V.

That said N. W. Turrell acting as Plaintiff's agent

as above set out on the 15th day of December, 1919, presented said check so endorsed to this Defendant and requested this Defendant to pay to said N. W. Turrell for Plaintiff the sum of \$1293.58 and to transmit said check to Spokane & Eastern Trust Company, at Spokane, Washington, where it would be taken up and paid by said Spokane & Eastern Trust Company, and the amount would be charged to Plaintiff's account in said Spokane & Eastern Trust Company. That on said date this Defendant paid to said N. W. Turrell as the agent of Plaintiff the sum of \$1293.58 and accepted said check.

VI.

That said N. W. Turrell all of said times was the cashier and manager of Plaintiff's business at Portland, Oregon, and as such cashier and manager and by reason of the authorization above set out had full authority from the Plaintiff to endorse said check in the manner above set out, and to collect and receive said money from this Defendant.

And this Defendant for a second further and separate defense herein to said first cause of action alleges:

I.

Restates the allegations of Paragraph I of the first further and separate defense.

II.

Restates the allegations of Paragraph II of the first

further and separate defense.

III.

That ever since said authorization on the 23rd day of July, 1919, said N. W. Turrell had been in the habit of drawing checks in the name of Plaintiff against said several accounts above mentioned and this Defendant always paid same when so drawn; and that ever since said 23rd day of July, 1919, said N. W. Turrell had been in the habit of endorsing checks payable to Plaintiff's order in the same manner as he endorsed the check sued on in this cause of action and presenting same when so endorsed to this Defendant for payment. And this Defendant because of said authorization above mentioned and because of the authority vested in said N. W. Turrell by the Plaintiff always cashed said checks when so presented and delivered the money to said N. W. Turrell for the Plaintiff; and the said checks were thereupon paid to this Defendant by the respective drawee banks and charged to the Plaintiff's account.

IV.

That a proper audit or check of its books and business at Portland, Oregon, and Spokane, Washington, and the accounts of the said N. W. Turrell would have shown to the Plaintiff the practice and doing of said N. W. Turrell as above set out.

V.

That during all the times herein mentioned from

July 23, 1919, up to the 15th day of December, 1919, Plaintiff in addition to said three accounts carried in Defendant's bank, carried an account in the Spokane & Eastern Trust Company, at Spokane, Washington, the drawee of the check sued on in this cause of action. That during all said times there were monthly statements rendered and settlements made between Plaintiff and this Defendant, and between Plaintiff and said Spokane & Eastern Trust Company, and at such settlement Plaintiff's cancelled checks and itemized statements of Plaintiff's account with the respective banks were returned to it by this Defendant and by said Spokane & Eastern Trust Company, and an account stated was had each month between Plaintiff and this Defendant and between Plaintiff and said Spokane & Eastern Trust Company.

VI.

That Plaintiff at no time before the 1st day of January, 1921, made any objection to said payments by the Defendant, or claimed that said Turrell was without authority to so receive the money on said checks; and the Plaintiff by its silence ratified and confirmed the acts and doings of said N. W. Turrell in drawing checks on Plaintiff's accounts with the Defendant and in so endorsing checks and receiving the cash thereon, and by said silence this Defendant was led to believe that said N. W. Turrell had such authority.

VII.

That Defendant because of the facts above stated paid to said N. W. Turrell as agent for the Plaintiff the sum of \$1293.58 when he presented to the Defendant the check sued on in the first cause of action herein, and the Plaintiff is now estopped to deny that said N. W. Turrell had authority to receive such payment.

And this Defendant for a third further and separate defense herein to said first cause of action, alleges:

I.

That this Defendant is informed and believes and therefore alleges to be a fact that when the Defendant paid over to said N. W. Turrell for the Plaintiff the sum of \$1293.58 as set out in Defendant's first further and separate defense herein, said N. W. Turrell misappropriated same.

II.

That the Plaintiff learned of said fraud of said N. W. Turrell a long time prior to the 20th day of July, 1921, but said Plaintiff did not notify this Defendant of the said fraud of said N. W. Turrell until the 20th day of July, 1921.

III

That by Plaintiff's failure to promptly notify the Defendant of said fraud, the burden of which it now seeks to throw upon this Defendant, this Defendant was deprived of the opportunity to proceed against said

wrong-doer and thereby obtain from him restitution to this Defendant of the \$1293.58 which he obtained from the Defendant as set out in the Defendant's first further and separate defense herein until it was too late for Defendant to recover anything from said N. W. Turrell.

And Defendant for a fourth further and separate defense herein to said first cause of action, alleges that the Defendant is entitled to relief herein growing out of facts requiring the interposition of a Court of Equity and material to its defense in this, that this Defendant is informed and believes and therefore states the facts to be:

I.

That when this Defendant paid over to N. W. Turrell for the Plaintiff the said sum of \$1293.58 as set out in Defendant's first further and separate defense herein, said N. W. Turrell misappropriated said moneys and failed to pay the same over to the Plaintiff.

II.

That said N. W. Turrell purchased with said money the hereinafter described property:

The South Half of Lot One in Block Seven in Tilton's Addition to the City of Portland, Ore.

One 1920 Five Passenger Buick Touring Automobile, Factory Number 641498, Motor Number 630779.

One Cheney Electric Phonograph.

Equity in a Chickering Ampico Player Piano.
One Solitaire Diamond Ring.

III.

That on the 28th day of May, 1921, the said N. W. Turrell confessed to the Plaintiff that he had embezzled this and other moneys belonging to the Plaintiff.

IV.

That on or about the 10th day of June, 1921, said N. W. Turrell turned over to the Plaintiff at Plaintiff's demand and to make good this and other misappropriations, all the above described property, together with all the moneys said N. W. Turrell had on deposit in the United States National Bank of Portland; various claims and notes in favor of said N. W. Turrell; and other property, the description and value of which this Defendant is unable to give; and Defendant now says that if it should be determined by this Court that Defendant had no right to pay to said N. W. Turrell said sum of \$1293.58, it should also be decreed that Plaintiff received said property, money and claims above mentioned for Defendant's use and benefit and that Defendant is entitled to a decree herein directing a sale of said property above mentioned and an application of the proceeds thereof and of said moneys to the discharge of any claim Plaintiff may be adjudged to have because of the matters and things hereinabove and in said first cause of action set out and pleaded.

* * * *

WHEREFORE defendant having fully answered the Plaintiff's Complaint, prays that it be hence dismissed without delay and recover of and from the Plaintiff a Judgment for its costs and disbursements; and the Defendant prays that if it should be determined by this Court that the defendant had no right to pay to said N. W. Turrell any of the checks described in said eleven causes of action, it be decreed that Plaintiff received said property, money and claims described in the fourth further and separate defense to each of said causes of action, for Defendant's use and benefit, and that said property be sold and the proceeds therefrom, and said moneys, be applied to discharge any claim plaintiff may be adjudged to have because of the matters and things in said Complaint set forth.

DOLPH, MALLORY, SIMON & GEARIN,
and EDGAR FREED,

Attorneys for Defendant.

That thereafter, on January 18, 1922, Plaintiff filed the following

DEMURRER

Comes now the plaintiff in the above entitled court and cause and

I.

Demurs to defendant's third further and separate defenses to plaintiff's first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh causes

of action, on the ground and for the reason that said defenses do not state facts sufficient to constitute defenses to said causes of action.

II.

Demurs to defendant's fourth further and separate defenses to plaintiff's first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh causes of action, on the ground and for the reason that said defenses do not state facts sufficient to constitute defenses to said causes of action.

In presenting the first of said demurrers plaintiff will contend that it was under no duty to notify defendant of said fraud on the part of said N. W. Turrell, and further it is not alleged that defendant could have obtained restitution if so informed.

In the presentation of the second of said demurrers plaintiff will contend that the defendant's fourth defenses do not contain allegations that plaintiff applied the property received from N. W. Turrell in payment of the claims for which this action is brought, and that plaintiff was under no legal obligation to so apply said property.

DEY, HAMPSON & NELSON,
GEO. L. BULAND,

Attorneys for Plaintiff.

State of Oregon,
County of Multnomah,—ss.

I, G. L. Buland, one of attorneys for plaintiff, do

hereby certify that the above demurrers are not interposed for the purposes of delay, and that in my opinion the same are well founded in law.

GEO. L. BULAND.

That thereafter an order was entered pursuant to Stipulation of parties, allowing plaintiff to withdraw said Demurrer so far as it related to the fourth affirmative answers and defenses to plaintiff's causes of action, but allowing it to stand as to the third affirmative answers and defenses. On February 27, 1922, there was rendered by Hon. Charles E. Wolverton, Judge of said court, the following

OPINION

It is averred by the third defense that plaintiff was apprised of Turrell's fraud a long time prior to its notification of the defendant, and that, by reason thereof, defendant was deprived of its opportunity to proceed against the wrong-doer, and thereby obtain restitution.

The plaintiff challenges the sufficiency of this answer, and urges that, even if it were plaintiff's duty to speak, the defendant cannot avail itself of the failure to fulfill that duty unless injury has ensued.

The rule seems to be, as it respects loss through forgery, that the opportunity to proceed against the forger is a valuable one, the deprivation of which, by failure to give notice promptly, conclusively determines that loss has resulted, for there is no way by which it can be satisfactorily determined that there was no loss, unless

it be shown there is on hand a fund belonging to the forger out of which the defendant can reimburse himself in whole or in part. *Union Nat. Bank v. Farmers' & Mechanics' Nat. Bank*, 114 At. 506, 507; *McNeely Co. v. Bank of North America*, 221 Pa. 588; *United States v. National Exchange Bank*, 45 Fed. 163.

The present case is of marked analogy. An alleged agent of plaintiff has, through representation that he was such agent, obtained funds from the bank and embezzled them. Applying the rule, it is sufficient if it appears that the plaintiff failed to notify the bank promptly of the agent's want of authority and embezzlement of the funds, and the bank was thus deprived of its opportunity to proceed against the wrong-doer. This constitutes a complete defense without the necessity of showing further that the bank could have recouped if it had been sooner notified.

Demurrer overruled.

An order was duly made and entered as of that date overruling said Demurrer.

That thereafter, on March 28th, 1922, there was filed the following

REPLY

(Pursuant to Stipulation hereinafter appearing, only so much of the Reply is printed herein as relates to the defendant's answer to plaintiff's first cause of action, the Reply to the remaining causes of action being the same as to the first cause of action with such variations as were rendered appropriate by reason of the variation

in amounts and dates of the checks involved.)

Comes now the plaintiff in the above entitled court and cause and in reply to defendant's first further and separate defense to plaintiff's first cause of action:

I.

Admits that plaintiff was engaged in business in the City of Portland, Oregon, and had accounts in defendant bank as set forth in Paragraph I thereof, and admits that said accounts were at all times subject to withdrawal by plaintiff and denies each and every other allegation therein contained.

II.

Denies each and every allegation contained in Paragraph II thereof, except as the same are herein alleged to be true and in this respect avers that the only authority conferred by plaintiff on said N. W. Turrell in respect to the withdrawal of moneys from, or other dealings with, said defendant in behalf of plaintiff was the authority granted him by reason of letter of July 23, 1919, from plaintiff to said defendant as follows:

"Portland, Ore., July 23, 1919.

First National Bank,
Portland, Oregon.

Gentlemen:

Please be advised that the signatures of Julius Louisson and N. W. Turrell (that is, either of them) are authorized to sign checks drawn on the following accounts:

GENERAL CIGAR COMPANY INC.—REG-
ULAR ACCOUNT

GENERAL CIGAR COMPANY INC—SPE-
CIAL ACCOUNT

BENSON HOTEL CIGAR STAND

These instructions cancel the signature of Charles W. Hamilton, who is no longer in our employ at this Branch.

Following the signing of this letter, you will find the signatures of the two parties hereinabove mentioned.

Yours very truly,

GENERAL CIGAR CO. INC.,

M. A. Gunst Branch.

JL:LS

By (Signed) Julius Louisson,

Julius Louisson

Assistant Secretary and

N. W. Turrell

Sales Manager.

Cashier”

III.

Denies each and every allegation contained in Paragraph III thereof, except plaintiff admits that such authority as was conferred by the letter set forth in Paragraph II was in force and effect December 15, 1919, and that said N. W. Turrell had special authority to act for plaintiff to the extent and in the precise manner described in said letter.

IV.

Admits the allegations contained in Paragraph IV

thereof beginning at the first of said paragraph and ending with the endorsement set forth in words and figures on lines 26 and 29 of page 2 of said Answer. Denies each and every other allegation therein contained, except that plaintiff admits that said N. W. Turrell was authorized by plaintiff to affix plaintiff's rubber stamp endorsement in the words and figures set forth in Paragraph IV for the purpose of depositing said check to plaintiff's account with defendant bank and permitting the said defendant bank to collect and receive the proceeds of said check for plaintiff's account.

V.

Denies each and every allegation contained in Paragraph V thereof except that plaintiff admits that said N. W. Turrell on December 15, 1919, presented said check endorsed for deposit as above stated to defendant and that defendant paid said N. W. Turrell personally the face of said check, to-wit: \$1293.58.

VI.

Denies each and every allegation contained in Paragraph VI thereof, except that plaintiff admits that the position held by said N. W. Turrell with plaintiff was called "Cashier", and that the said N. W. Turrell had authority to affix to checks received by plaintiff the said rubber stamp endorsement for purposes of deposit and such other authority as was specifically created by the writing set forth in Paragraph II of this reply.

In reply to defendant's second further and separate

defense to plaintiff's first cause of action plaintiff admits, denies and alleges as follows, to-wit:

I.

Replying to Paragraph I hereof repeats and makes a part hereof the admission, denials and allegations made to Paragraph I of defendant's first further and separate defense to said first cause of action.

II.

Replying to Paragraph II thereof repeats and makes a part hereof the admissions, denials and allegations made to Paragraph II of defendant's first further and separate defense to said first cause of action.

III.

Denies each and every allegation contained in Paragraph III thereof, except that plaintiff admits that said N. W. Turrell had ever since July 23, 1919, drawn checks as plaintiff's agent and in plaintiff's name against plaintiff's several accounts above mentioned, and defendant always paid same when so drawn and plaintiff further admits that said N. W. Turrell had without authority from plaintiff and without plaintiff's knowledge obtained from defendant bank the amounts for which the eleven checks described in plaintiff's complaint herein were made payable, notwithstanding said special endorsement for purposes of deposit and plaintiff admits that said checks were thereafter paid to defendant by the respective drawee banks situated in cities other than

Portland and charged by said drawee banks to plaintiff's account therein.

IV.

Denies each and every allegation contained in Paragraph IV thereof.

V.

Admits the allegations contained in Paragraph V thereof, except that plaintiff denies that an account was stated each month between plaintiff and defendant, except in regard to deposits and withdrawals in plaintiff's account with defendant. Denies that an account was stated between plaintiff and said Spokane & Eastern Trust Company, except in regard to the deposits and withdrawals in plaintiff's account in said Spokane & Eastern Trust Company.

VI.

Denies each and every allegation contained in Paragraph VI thereof, except that plaintiff admits that at no time before the 1st day of January, 1921, did it make any objection to said payments by the defendant to said N. W. Turrell personally of the amounts of checks endorsed for deposit, or claim that said Turrell was without authority to so receive or appropriate the sums represented by said checks and in this respect avers that at said times it was without knowledge, information or reason to suspect that said defendant bank had made any such payments to said N. W. Turrell.

VII.

Denies each and every allegation contained in Paragraph VII thereof.

Plaintiff in reply to defendant's third further and separate defense to plaintiff's first cause of action, admits, denies and alleges as follows, to-wit:

I.

Admits the allegations contained in Paragraph I thereof, except that plaintiff denies that plaintiff paid over to N. W. Turrell for plaintiff the sum of \$1293.58, as set forth in defendant's first further and separate defense and alleges that said sum was paid by defendant to said N. W. Turrell as set out in plaintiff's complaint and not otherwise.

II.

Denies each and every allegation contained in Paragraphs II and III thereof.

Plaintiff in reply to defendant's fourth, further and separate defense to plaintiff's first cause of action denies that said defendant is entitled to relief, requiring the interposition of a court of equity, and in regard to the allegations contained in said fourth further and separate defense admits, denies and alleges as follows, to-wit:

I.

Admits the allegations contained in Paragraph I thereof, except that plaintiff denies that defendant paid

over to said N. W. Turrell for plaintiff the sum of \$1293.58, as set out in defendant's first further and separate defense, and alleges that said sum was paid by defendant to N. W. Turrell as set forth in plaintiff's complaint and not otherwise.

II.

Denies each and every allegation contained in Paragraph II thereof.

III.

Admits that on or about May 28, 1921, said N. W. Turrell confessed that he had embezzled large sums from the plaintiff, the exact sum and dates of which embezzlement he, the said Turrell, had obtained from a teller of remember, and that in addition to said acts of embezzlement he, the said Turrall, had obtained from a teller of defendant bank the amount of a number of checks drawn on out of town banks, payable to plaintiff, notwithstanding the fact that said checks were endorsed for deposit, the exact sums and dates of said checks not being remembered by said Turrell. Plaintiff denies each and every other allegation contained in said Paragraph III thereof.

IV.

Denies each and every allegation contained in Paragraph IV thereof, except those herein alleged to be true, and in this respect avers that in addition to the sums which plaintiff seeks to recover from the defendant in

this action, said N. W. Turrell wrongfully took and converted other moneys belonging to plaintiff prior to November 30, 1920, amounting in all to \$7876.25, and said N. W. Turrell was and now is indebted to plaintiff in said sum, and the embezzlement of said sum and the indebtedness of said Turrell to the plaintiff therefore distinct and separate from the indebtedness sought to be recovered in this action. That on or about June 1, 1921, said N. W. Turrell and Dagmar Turrell, his wife, being then the owners of the following described property:

“The south $\frac{1}{2}$ of Lot 1 Block 7 Tilton’s Addition
to the City of Portland, Oregon,
1920 5-passenger Buick Touring Car, Serial No. 691498,
1 Cheney Electric Phonograph,
Equity in Player Piano,
1 Diamond Ring,
Equity in contract held in office of Frank L. M.
Guire,
Deposit in U. S. National Bank, and
Stock in General Cigar Company”

transferred, conveyed and set over said property to or for Carl G. Tipton, and subsequently in July, 1921, transferred, conveyed and set over to said Carl G. Tipton the following described property:

“Note of John D. Methol and Beryl Methol for
\$200.00,
Note of Standard Tire & Supply Co. Inc. on which
\$150.00 was due, with interest.

Claim of \$500.00 against S. K. Brown''; that all of said property was transferred to said Carl G. Tipton upon the trust that he convert the same into cash and pay the proceeds thereof to plaintiff in payment of the sums owing by the said N. W. Turrell to plaintiff, the amount so paid to be applied by plaintiff on such indebtedness of said N. W. Turrell to plaintiff as plaintiff should see fit; that all sums paid over by said Carl G. Tipton to plaintiff pursuant to the aforesaid trust have been applied by plaintiff with the consent and direction of said N. W. Turrell on said indebtedness of \$7876.25, due as aforesaid with interest from said N. W. Turrell to plaintiff and the amounts received by plaintiff have not been sufficient to pay in full said indebtedness of \$7876.25, and that the total value of said assets is less than said indebtedness.

* * * *

WHEREFORE plaintiff prays that it recover judgment of and from the defendant as demanded in its complaint on file herein and that the equitable relief prayed for in defendant's answer be denied.

DEY, HAMPSON & NELSON,
GEO. L. BULAND,

Attorneys for Plaintiff.

That thereafter, on June 5th, 1922, the said cause came on for trial on June 6th, 1922, the following Judgment Order was made and entered:

JUDGMENT ORDER

Portland, Ore., June 6, 1922.

Now, at this day, came the parties hereto, by their counsel, as of yestetrday, whereupon the Jury empanelled herein being present and answering to their names, the trial of this cause is resumed. And said Jury having heard the evidence adduced, the arguments of counsel and the charge of the court, retire in charge of proper sworn officers to consider of their verdict. And thereafter, said Jury returns to the court the following verdict, viz:

“We, the Jury in the above entitled case, find for the Defendant.

(Signed) CLAUDE I. SCOGGINS,
Foreman.”

which verdict is received by the court and ordered to be filed.

WHEREUPON it is adjudged that plaintiff take nothing by this action; that defendant go hence without pay, and that said defendant do have and recover of and from said plaintiff its costs and disbursements herein, taxed in the sum of \$35.92 and that defendant have execution therefor.

On June 15, 1922, there was made and entered the following

ORDER

Upon appliaction of plaintiff pursuant to stipulation of parties,

IT IS HEREBY ORDERED that the plaintiff may have to and including twenty days from date hereof in which to serve and file motion for new trial in the above entitled action.

IT IS FURTHER ORDERED that plaintiff may have to and including sixty days from date hereof in which to serve and tender bill of exceptions herein.

DATED this 15th day of June, 1922.

CHARLES E. WOLVERTON,
Judge.

On June 28, 1922, there was duly served and filed the following

**NOTICE OF PRESENTATION OF MOTION
FOR NEW TRIAL**

To the above named Plaintiff and to Messrs. Dolph, Mallory, Simon & Gearin, and Edgar Freed, its attorneys:

You will please take notice that on Monday, the 3rd day of July, 1922, at the hour of ten o'clock A. M. or at such time thereafter as may then and therebe fixed by the Court at the Courtroom of the United States District Court in the Post Office Building at Portland, Oregon, before the Honorable C. E. Wolverton, Judge, plaintiff will present his Motion to set aside the verdict and judgment in the above entitled cause, and to grant a new trial thereof upon the grounds set forth in the Notice of Intention to Move for New Trial herewith

Served upon you, and upon the papers and records therein mentioned, and the files of the Clerk herein.

Dated June 28, 1922.

DEY, HAMPSON & NELSON,
GEO. L. BULAND,

Attorneys for Plaintiff.

and the following

NOTICE OF INTENTION TO MOVE FOR NEW TRIAL

To the above named Plaintiff, and to Messrs. Dolph, Mallory, Simon and Gearin, and Edgar Freed, its attorneys, and to the Clerk of said Court:

You will please take notice that the plaintiff intends to move the Court to vacate the verdict and judgment heretofore made and entered in the above entitled cause, and to grant a new trial of said cause for the following causes materially affecting the substantial rights of the defendant, and upon the grounds hereinafter set forth, to-wit:

I.

Because of errors of law occurring at the trial and duly excepted to by the plaintiff in the following particulars:

(a) Instruction to the Jury as follows:

“Now gentlemen of the jury, I instruct you further that the burden of proof lies with the plaintiff to show that the defendant bank paid out money

without authority from the plaintiff, either real or apparent.”

It was and is contended by the plaintiff that the burden of proof lies with the defendant to show that it paid out the plaintiff's money upon the plaintiff's authority and the burden is not upon the plaintiff to prove the negative.

(b) Instruction to the Jury as follows:

“As it respects the second answer, it is a rule of law that a depositor must examine the bank's periodical statements and report to the bank without any unreasonable delay any errors he may discover, or the bank may regard his silence as an admission that the entries as shown are correct.

“It is alleged, among other things, that at all times from July 23, 1919, to December 15th of the same year, the plaintiff, in addition to the three accounts carried in the defendant bank, carried accounts in the Spokane & Eastern Trust Company, of Spokane, and the Union National Bank, of Seattle, and that each of these banks, including the defendant bank, rendered a monthly statement to plaintiff of its account therewith; that thereby the plaintiff was advised as to the exact condition of its account in each of these banks, respectively, touching the amounts of money drawn from the bank by Turrell, but made no objection thereto, and gave the bank no information touching any irregularity affecting such accounts.

“If you find from the evidence in the case that

such were the facts, and that the plaintiff was so advised and failed, within a reasonable time, to advise the defendant bank of such irregularities, then the plaintiff would be estopped now to assert that defendant was liable for its acts in paying the money over to Turrell in pursuance of his request or demand, and your verdict should be for the defendant."

The ground of objection on the part of the plaintiff was and is that there was no evidence that an examination of the bank's periodical statements would have disclosed the wrongful transactions on the part of Turrell, but on the contrary the evidence showed that the endorsements upon which the defendant bank paid moneys to Turrell was the endorsement uniformly used by the plaintiff for purposes of deposit; that the said checks would not be returned by the defendant bank but would be returned by the Spokane and Seattle banks to the drawers at said points and there would be nothing in the bank's statements at said points or on the face or reverse of the checks themselves to indicate anything other than deposit in the regular course of business. The instruction is subject to the further objection that it exempts the defendant bank from all liability, even with regard to past transactions which had been consummated before the rendering of any statements.

(c) Instruction to the Jury as follows:

"And in this relation, I further instruct you that a depositor who has permitted his agent to verify the bank's statements is charged with notice of

the fraud which would be disclosed by the examination of such statements, though not with the agent's knowledge of the fraud which he may have acquired otherwise than through such statements.

“If you believe from the evidence a reasonably careful examination of the monthly statements rendered and cancelled vouchers returned to the plaintiff General Cigar Company by the defendant First National Bank and the Spokane & Eastern Trust Company, would have disclosed to the General Cigar Company the fact that the checks involved in the first, fourth, fifth and ninth causes of action had not been credited to the General Cigar Company's account with the First National Bank and if you also believe that prior to July 20, 1921, the General Cigar Company made no objections concerning plaintiff's account with defendant or the cashing of these checks, you must find for the defendant on the first, fourth, fifth and ninth causes of action.

“If you believe from the evidence that a reasonably careful examination of the monthly statements rendered and cancelled vouchers returned to the plaintiff by the First National Bank and the Union National Bank would have disclosed to the General Cigar Company the fact that the checks involved in the second, third, sixth, tenth and eleventh causes of action had not been credited to the General Cigar Company's account with the First National Bank, and if you also believe that prior to July 20, 1921,

the General Cigar Company made no objections concerning plaintiff's account with defendant or the cashing of these checks, you must find for the defendant on the second, third sixth, tenth and eleventh causes of action."

The basis of objection to this instruction is as set out under (b).

(d) Refusal to grant plaintiff's request for Instruction *supra* numbered I, as follows:

"This is an action instituted by General Cigar Company, Inc., a corporation, against First National Bank of Portland, Oregon, a National Banking corporation. It is admitted that both the plaintiff and defendant are incorporated as alleged.

"There are several causes of action in the plaintiff's Complaint and inasmuch as the Answer to each and the Reply to the Answer involve precisely the same issues, I will simply take the first of these and you will understand that what I have to say as to the first applies with equal force to each of the others.

"The General Cigar Company conducted a wholesale and retail cigar and tobacco business in the City of Portland, Oregon and the same corporation had a branch at Spokane, Washington, engaged in a similar line of business. The Spokane branch being indebted to the Portland branch for merchandise, issued its check Payable to the General Cigar Company, Portland, Oregon, in the sum of \$1293.58. This check was drawn on the Spokane

& Eastern Trust Co., a banking corporation of Spokane, Washington. The check was received at the Portland office and there was endorsed upon the check by rubber stamp endorsement the following:

“ ‘Pay to the order of First National Bank
 335 Portland, Oregon 335
 General Cigar Co., Inc.
 M. A. Gunst Branch
 M. A. Gunst & Co.’ ”

“I instruct you that the effect of affixing such a stamp to the back of a check is to make the check payable to a special banking corporation, namely the First National Bank, of Portland, Oregon, and is a method of endorsement commonly utilized for purposes of deposit, and had been so utilized throughout the dealings of the General Cigar Company with the First National Bank.

“It further appears that one Neil W. Turrell, Cashier of the General Cigar Co. had by virtue of a letter or power of attorney from the General Cigar Co., lodged with the First National Bank in July, 1919, been specifically authorized to sign checks on the funds of the General Cigar Co. or deposit with the First National Bank. Turrell took the Spokane check which I have described to you, endorsed as I have said, to the defendant First National Bank, and the defendant First National Bank, to which the check was made payable by endorsement, paid the face amount thereof in cash

to the said Turrell, and then in turn collected the amount of the check from the Bank on which it was drawn, that is, the Spokane & Eastern Trust Company at Spokane. It is admitted that the Bank did not credit the amount of the check to the General Cigar Company's account at Portland, Oregon, and that unless the Bank had authority to pay the cash to Turrell and unless the payment to Turrell was in law and in fact a payment to the General Cigar Company, or unless you should find the bank is released from liability because of other matters to which I shall hereafter advert, the General Cigar Company has not been paid and the First National Bank is indebted to it in the amount of the check. Whether or not such liability exists is the question for you in this case, and it becomes necessary for me to explain to you how an agency is created, what authority an agent ordinarily has, and what are the respective rights and duties of the depositor and of the Bank."

(e) Refusal to grant plaintiff's request for Instruction number II, as follows:

"I instruct you that when a negotiable instrument, such as the check in the case at bar, is endorsed specifically to a banking corporation, that the party having physical possession of such a check has not from the possession of such check alone, any authority to negotiate the same or receive the proceeds thereof."

(f) Refusal to grant plaintiff's request for In-

struction numbered III, as follows:

“I instruct you that an agent has the authority which is actually formally and expressly conferred upon him and the power necessary to carry his instructions into effect, and also such power as he is held out by the principal to the world and to those dealing with him as having. The principal has a right to limit and define this authority and when he does so limit it, the agency for those particular purposes, at least, becomes a special agency, and all persons must have regard to the limitations imposed, and if they deal with the agent on such a special field of agency in any other way than the way prescribed by the principal, the principal is not ordinarily bound. In this case it is not disputed that there was conferred upon the agent, Turrell, by a letter or power of attorney, certain specific authority with reference to checks, i. e., the authority to sign checks on certain designated accounts and to sign these checks in a certain designated way, that is, as Cashier. That thereupon it became the bank's duty to the principal, the General Cigar Company, to decline to cash any checks on the funds of the depositor save and except those executed in the manner specified in the power of attorney, unless it has been shown to you that other or broader authority was conferred in some effective manner.

(g) Refusal to grant plaintiff's request for Instruction numbered IV, as follows:

“I instruct you that the letter or power of at-

torney was silent on the subject of endorsements; that the rubber stamp endorsement making a check received by a depositor on an out of town bank payable to the order of the local bank in which he deposits, is one not required to be affixed by the principal himself or by any one holding any special powers and passes title to the fund to the depository bank alone. When the check is so stamped and is deposited with the bank to which it is made payable, by the rubber stamp endorsement, it is placed to the credit of the depositor and no question ordinarily arises as to the individual or the authority of the individual affixing the rubber stamp."

(h) Refusal to grant plaintiff's request for Instruction numbered V, as follows:

"In this case it is claimed by the Defendant Bank that the rubber stamp which I have described was used for another purpose than that of deposit, that is that it was used for the purpose of obtaining cash over the counter and that Turrell, to whom I have referred, had authority from the plaintiff, General Cigar Co., to obtain through the use of said rubber stamp endorsement, cash from the Defendant Bank on checks received by the General Cigar Co. drawn on out of town banking institutions. I instruct you that the burden of proof is on the defendant First National Bank, to show that Turrell had the authority which the Bank claims. There is no presumption of such authority. Neither the letter of July, 1919, authorizing Turrell to sign

checks, nor the fact that he or other employees could stamp out of town checks payable to the order of the First National Bank creates of itself any authority on Turrell to obtain cash on such facts and it is incumbent upon the defendant, First National Bank, seeking to justify payment of cash to Turrell thereon, to prove to you by a preponderance of evidence that Turrell had such authority.

“In considering the question of whether or not such authority existed, you are not only entitled, but it is your duty to consider all the facts in testimony and the circumstances surrounding the parties and attending the transactions and to determine from such a consideration whether or not the bank has established Turrell’s authority to cash said checks and the Bank’s right to pay them instead of placing them to the credit of its depositor, General Cigar Company. The Bank can justify itself and prevent a recovery in this case only by proving that the money was placed to the credit of the General Cigar Company or was otherwise used for the benefit of the General Cigar Company, and, it being admitted that it was not credited to the General Cigar Company but was paid to Turrell, the Bank must show that when it made a payment to Turrell it was under Turrell’s authority paying the money to the General Cigar Company.”

(i) Refusal to grant plaintiff’s request for Instruction numbered VI, as follows:

“I instruct you that the letter or power of attorney of July, 1919, clearly required the signature for the General Cigar Co. of two persons, Julius Louisson, the Manager, or Neil W. Turrell, Cashier, and that meant their signature in a representative capacity, as manager or cashier respectively, and not merely as individuals. There has been no testimony to show any authority to the Bank or any practice or course of dealing between the parties which would justify the bank in paying out cash on a rubber stamp signature without the personal signature of either the manager or cashier as such, unless it can be said that the payment of the amount of the several checks involved in this case to Turrell created or constituted, because of failure of the General Cigar Company, to object, such authority on the part of Turrell.”

(j) Refusal to grant plaintiff's request for Instruction numbered VII, as follows:

“I instruct you that, in order for a person to be called upon to object to a wrongful or unauthorized course of practice it is necessary that he know the facts and know the practice, or that a reasonably prudent person or concern under similar circumstances would have had such knowledge in an ordinarily intelligent conduct of his or its affairs. The question therefore becomes one of fact for you to determine and the burden of proof in this regard is also upon the defendant, First National Bank, to

show that the General Cigar Company, by giving in the matter of the Seattle and Spokane checks the attention and care which a reasonably prudent person under similar circumstances would have given them, would have discovered sooner than the General Cigar Company did discover, the method in which cash was withdrawn from the Defendant Bank on said out of town checks. The test in this regard is not what would have been discovered by the highest conceivable degree of care or by the investigation of a person abnormally suspicious, but only the care which an ordinarily prudent person or concern may reasonably be held to be bound to devote to its business and affairs under similar circumstances.”

(k) Refusal to grant plaintiff's request for Instruction numbered VIII, as follows:

“In considering the question submitted to you by the foregoing Instruction, I instruct you that the checks which form the basis of this action and for which Turrell received cash from the First National Bank were drawn on out of town banks other than the defendant bank. The statements received monthly by the plaintiff from the Defendant Bank indicated only the state of the plaintiff's account with the Defendant Bank and did not tend to indicate the state of the accounts on which the checks in question were drawn. Therefore, from an examination of those statements alone, the wrongful

acts of Turrell in question would not be shown to the plaintiff, nor could it thereby discover such wrongful acts of Turrell in cashing the checks in question. It would be necessary for the plaintiff to check its accounts with the books of the out of town branches and the accounts that such branches had with the banks with which they did business. It is for you to determine as a question of fact whether the plaintiff exercised reasonable care or was negligent in its system of checking the transactions between its Portland branch with the accounts from the various other branches. It is to be observed by you that the checks returned to the Spokane branch by the Spokane bank of deposit and to the Seattle branch by the Seattle bank of deposit, would not present any reason to believe that an irregularity had occurred since the Spokane and Seattle banks had a right, when receiving the checks through the First National Bank of Portland, with the approved rubber stamp endorsement of the General Cigar Company at Portland of the order of the First National Bank, to assume that these had passed through the hands of the First National Bank in a regular, proper and orderly manner and the Spokane and Seattle banks hand the right to charge the amount of these checks against their respective depositors at those points."

(1) Refusal to grant plaintiff's request for Instruction numbered IX, as follows:

“The Defendant Bank as one of its defenses in this case asserts that the plaintiff, General Cigar Company knew of the course of conduct on the part of Turrell with reference to the checks in suit, for a long time prior to communicating that knowledge to the Defendant Bank and that the Bank was thereby deprived of an opportunity to recover all or a part of the loss. I instruct you that by facts stipulated in this case, it appears that all of Turrell’s property was attached by the General Cigar Company at a time when it knew only of Turrell’s embezzlement by means of checks payable to cash, not involved in this action, and that shortly thereafter the property so attached and all of Turrell’s property acquired during the period of defalcation, was turned over to one J. H. Tipton as Trustee and that the question of the application of the proceeds of said property is one of law upon which this court will pass, the facts being admitted and it affirmatively appears from such admitted facts that no harm has resulted to the First National Bank by reason of any such alleged delay. I instruct you, therefore, to disregard the third further and separate defense on the subject of loss to the Bank through alleged delay in notifying it of the claim which is the subject of this action.”

(m) Refusal to grant plaintiff’s request for Instruction numbered IX $\frac{1}{2}$, as follows:

“(If the instruction No. IX foregoing is refused by the Court, the plaintiff desires to be al-

lowed an exception to such refusal, and asks without waiving its objection to the denial of the foregoing, in the event of its refusal, that the following instruction be given.)

“One of the defenses advanced by the Defendant Bank is that the plaintiff delayed unreasonably in informing it of the course of conduct on the part of Turrell with reference to the checks in suit. It was the duty of the plaintiff, General Cigar Company within a reasonable time after ascertaining the facts, to communicate them to the Bank. The General Cigar Company had the right to make such inquiry as was necessary to ascertain the facts and was charged with the duty of making such inquiry with diligence. It could not be required to give notice as to the amounts claimed to have been diverted until, as a result of diligent inquiry, it had the opportunity to know them itself. In order to sustain this defense on the part of the Bank, therefore, it must appear to you from a preponderance of the evidence that the General Cigar Company, after having reason to suspect the facts in connection with the checks in suit, delayed unreasonably in compiling the data on the subject and in communicating the result of its investigation and inquiry to the First National Bank. If you believe that the first intimation on the subject came from Turrell’s confession at the end of May, 1921, and that the wires were used in the effort to ascertain the facts and that copies of documents had to be procured

from the various banks and an accounting and audit were essential, and that the data could not reasonably be compiled short of June 20th, at which date the bank was given formal notice of the amount of the several checks, then I instruct you that the General Cigar Company acted with reasonable diligence and the Bank cannot avoid liability under that defense."

* * * *

To the giving of each of said instructions by the Court exception was duly taken and allowed and to the refusal to give the instructions requested by the Plaintiff exceptions were likewise duly taken and allowed.

II.

That the verdict is not in accordance with the weight of evidence in that the evidence required at the jury's hands a finding in favor of the Plaintiff on cause of action arising before the rendering of any monthly statements or before the theory of estoppel could be invoked, because of failure to ascertain the facts as to Turrell's conduct and to act on such information.

Dated at Portland, Ore., June 28, 1922.

DEY, HAMPSON & NELSON,

Attorneys for Plaintiff.

GEO. L. BULAND,

Attorney for Defendant.

I, Roscoe C. Nelson, certify that I am one of the Attorneys of record for the Plaintiff in the above entitled matter; that said Motion is presented in good faith and I believe same to be well founded in law.

ROSCOE C. NELSON.

That thereafter, on July 17th, 1922, said Motion was duly argued by counsel and there was made and entered the following

ORDER DENYING MOTION FOR NEW
TRIAL

July 17, 1922.

Now at this day, this cause comes on to be heard by the court on the motion of Plaintiff above named for a New Trial herein, Plaintiff appearing by Mr. Roscoe C. Nelson of counsel, and Defendant by Mr. John Gearin and Mr. Edgar Freed, of counsel, and the Court having heard the arguments of counsel, upon consideration thereof,

IT IS ORDERED that said motion be and the same is hereby denied.

That thereafter, on August 10th, 1922, there was made and entered the following

ORDER

Pursuant to Stipulation of parties hereto,

IT IS HEREBY ORDERED, that plaintiff may have to and including October 1, 1922, within which to

serve and tender its Bills of Exceptions herein.

Dated this 10th day of August, 1922.

C. E. WOLVERTON,

Judge.

That thereafter, on September 25th, there was made and entered the following

ORDER.

Pursuant to Stipulation of the parties hereto,

IT IS HEREBY ORDERED that Plaintiff may have to and including October 31st, 1922, within which to serve and tender its Bill of Exceptions herein.

DATED this 25th day of September, 1922.

CHAS. E. WOLVERTON,

Judge.

That thereafter, prior to the 31st day of October, 1922, there was served, tendered and lodged with the Clerk of said Court, a Bill of Exceptions, and thereafter, on November 14, 1922, the Court settled, allowed and approved the following

BILL OF EXCEPTIONS.

BE IT REMEMBERED that the foregoing cause came on to be heard on the 5th day of June, 1922, before Hon. Charles E. Wolverton, Judge of the above entitled court, Plaintiff appearing by its duly authorized agents and Dey, Hampson & Nelson, Roscoe C. Nelson and G. L. Buland, its Attorneys, and Defendant by its duly authorized agent and Dolph, Mallory, Simon &

Gearin, John M. Gearin and Edgar Freed, its Attorneys.

Thereupon a Jury was empanelled for the trial of said cause.

A Stipulation was entered into between the parties, in respect to the Defendant's Fourth Affirmative Defense which eliminated said Defense from consideration by the Jury.

It was further agreed and stipulated by said parties that the seventh and eighth causes of action in Plaintiff's Complaint should be dismissed and the prayer of plaintiff's Complaint amended to eliminate demand for judgment on the two items concerned in said causes of action, and order to that effect was made by the Court.

TESTIMONY.

Julius Louisson, Witness for Plaintiff.

Mr. Julius Louisson was the first witness called on behalf of Plaintiff. He testified that he was the manager of the Portland Branch of the General Cigar Company and had been associated with the General Cigar Company and its predecessors for many years. He testified that Mr. Neil W. Turrell was first employed by the General Cigar Company in the capacity of bookkeeper; that thereafter, on July 1, 1919, he was promoted to Cashier of the Portland office of General Cigar Company. His duties in that office were to have charge of the cash and was head office clerk, and authority was conferred upon him by the General Cigar

Company with reference to the signing of checks on the First National Bank, which authority was conferred in a letter written the First National Bank. This letter was introduced in evidence as Plaintiff's "Exhibit 1" without objection, and is as follows:

**"GENERAL CIGAR CO., INC.
M. A. GUNST BRANCH
84 N. 5th St.**

Portland, Ore., July 23, 1919.

First National Bank,
Portland, Oregon.

Gentlemen:

Please be advised that the signatures of Julius Louisson and N. W. Turrell (that is, either of them) are authorized to sign checks drawn on the following accounts:

**GENERAL CIGAR COMPANY, INC.—
REGULAR ACCOUNT
GENERAL CIGAR COMPANY, INC.—
SPECIAL ACCOUNT
BENSON HOTEL CIGAR STAND.**

These instructions cancel the signature of Charles W. Hamilton, who is no longer in our employ at this Branch.

Following the signing of this letter, you will find the signatures of the two parties hereinabove mentioned.

Yours very truly,
GENERAL CIGAR CO., INC.,

M. A. GUNST BRANCH,

By Julius Louisson,

Assistant Secretary and Sales Manager.

JL:LB

N. W. Turrell, Cashier."

Mr. Louisson testified that the signature appearing on said letter were his own and Mr. Neil W. Turrell's; that he was the only one in connection with the Company who was authorized to give any power to Mr. Turrell and that no additional or enlarged or different powers were given to Mr. Turrell by any writing; that there was no other power of attorney or writing which authorized Mr. Turrell to endorse checks for the General Cigar Company; that there was no occasion to endorse any checks except when they were intended for deposit in the Bank when all that was used was a rubber stamp which anybody could affix to a check and take it to the bank and deposit it; that deposits in the First National Bank were generally made by the bookkeeper who would place rubber stamp endorsement on checks and take them to the Bank which credited the General Cigar Company's account. The stamp used was a printed rubber stamp reading "Pay to the order of First National Bank," signed: "General Cigar Company" which is the usual stamp that all businesses use in sending checks to bank. In the period of 24 years during which he had been connected with Plaintiff or its predecessor, he had never seen the stamp referred to used for the cashing of any checks and if cash was needed, a special check would be issued for that purpose. He

recalled no instance where a check from out of town from a customer or from one of the other branches of Plaintiff on an out of town bank was cashed. The Plaintiff's payroll was paid by check. In rare instances, small amounts were paid in cash but such amounts never ran over \$100 or \$200 at the very most. The bookkeeper, Mr. Beach, generally made deposits with Defendant, although at times Mr. Turrell took up the deposit himself or at times other parties. When statements were made up at the end of each month, by defendant, of plaintiff's accounts, Mr. Turrell would get these and there was no one over him to check such statements, except that yearly accounts were gone over, by accountants. The accountants went over the books of the Company in January, 1920, and January, 1921, but at said times reported no irregularities.

Mr. Louisson testified that he was never suspicious of Mr. Turrell in any way from the time that he became Cashier, or before that when he was bookkeeper, until after his employment with the Company terminated; that he did not recall any circumstances that caused him to be suspicious of Mr. Turrell during that time. The year 1920, the business of the Portland Branch of the General Cigar Company did show a leak which was believed to be a stock shortage, and Plaintiff went to a great deal of expense to audit the stock books but found nothing wrong. The same thing occurred again at the end of 1920, but no suspicion was directed at Mr. Turrell or any one else. Mr. Turrell appeared to assist in attempting to find the stock leakage. Mr.

Turrell's connection with the Plaintiff Company ceased on December 31, 1920. Towards the end of that year, his work had become unsatisfactory. He was careless and didn't show the enthusiasm which he should have shown and so it was decided to let him go the last of the year. Mr. Louisson asked him, however, to stay on until the latter part of January after the auditors had been there and audited the books, so that he could help them in different things which they wanted to know which Mr. Turrell did. Thereafter, the audit not revealing the trouble, and not being able to find any shortage in the stock, the Pinkerton Detective Agency was consulted and said Company found out that Mr. Turrell had made large deposits in the United States National Bank and investigated the report that Turrell had inherited money from his family and found such report false. Later, Plaintiff's San Francisco office sent the Portland office cancelled checks which it had discovered, made out payable to Cash, the corresponding stubs having been marked void or cancelled, and it appearing that similar amounts had been deposited to Turrell's account in the United States National Bank, it was then believed that Mr. Turrell had been guilty of embezzlement. The information that indicated Mr. Turrell to be guilty was found May 26th or May 27th, 1921. At that time, Plaintiff had no information as to any other checks which Mr. Turrell had used irregularly except those payable to "cash". Immediately warrant was procured for Mr. Turrell's arrest and he was arrested and simultaneously action was taken to attach

certain property of Mr. Turrell's. In a day or so Mr. Turrell offered to confess and such confession was made. In such confession, Mr. Turrell admitted to obtaining money not only on the checks which he had made out payable to "cash", but he also said that in addition to this he had taken out of town checks to the amount of \$10,00 or \$12,000 to the bank, endorsed them with the rubber stamp endorsement which stamp had been used by Plaintiff for the purpose of deposit at the bank, and had cashed these checks and obtained the money from the bank. Plaintiff's San Francisco office was immediately notified of Mr. Turrell's statements and how much he had obtained. The Bank deposit slips were not available and it was necessary to go to the Bank and get them to give duplicate deposit slips for the year past. The Auditors worked as fast as they could and it took about six weeks before a complete statement as to the amount of the checks that were intended for deposit, but had been cashed, was developed. It was necessary to obtain duplicate deposit slips because the original deposit slips had been lost in a fire occurring on December 3, 1920, in Plaintiff's place of business. The audit of the Portland deposit slips and of the Seattle and Spokane deposits was completed so that an accurate statement was had of exactly what checks had been cashed after the middle of July, probably a few days later than that.

It was stipulated by counsel that demand was made on Defendant by Plaintiff on July 20, 1921, for a payment or crediting to its account of the sums obtained by

Turrell on the checks concerned in the various causes of action involved in this cause.

It was further stipulated that Defendant denied liability without assigning any reason for the rejection.

Mr. Louisson identified the checks described in the various causes of action set forth in Plaintiff's Complaint and testified that they were the ones in regard to which Turrell confessed and said checks were received in evidence as Plaintiff's Exhibits 2 to 10 without objection; the seventh and eighth causes of action having been dismissed, the checks described therein were not introduced in evidence. The checks so introduced were as described in the allegations of said Complaint. Each check was endorsed on the reverse side by the rubber stamp endorsement set forth in words and figures in Plaintiff's Complaint and were endorsed also by the First National Bank in words and figures, as follows:

Pay to the order of

Any bank, banker or trust company,

All prior endorsements
guaranteed

A April 2, 1920 A

FIRST NATIONAL BANK

24-4 Portland, Oregon. 24-4

H. E. Dickson, Cashier.

Said checks had no other endorsements except certain of them bore the endorsement of the Seattle branch of the Federal Reserve System and also except that the checks declared on in Plaintiff's Sixth cause of action

bore the indorsement "N. W. Turrell". All of said checks were marked paid.

Mr. Louisson testified that checks of this sort were received at Portland in this manner: The branches of the General Cigar Company were in the habit of drawing on each other for merchandise when one branch happened to have more merchandise than it needed and another branch needed merchandise. The Seattle and Spokane branches were buying a good many cigars from the Portland branches, particularly imported cigars, for which Portland was the only port of entry. If the Spokane or Seattle branches needed merchandise and the Portland branch had an oversupply, the Portland branch would ship the merchandise to the other branches and the other branches would pay for such merchandise by checks such as the above when the month was over. Mr. Louisson testified that the defendant had not given Plaintiff credit for the amount of these checks in any of its accounts at the bank and that Defendant has not paid Plaintiff any part of the amounts thereof.

Upon Cross Examination Mr. Louisson testified that Mr. Turrell's duties as Cashier for the General Cigar Company comprised the opening of all the mail, the taking charge of all the cash, having charge of the office and charge of the books of the branch, including the private ledger, which had the accounts that had to do with the inter-organization of the branches of Plaintiff's business. He testified that Mr. Turrell at times took the bank deposits to Defendant Bank, but mostly the Bank deposit was taken by the bookkeeper, Mr. Beach, and that he took the checks to the Bank that he had made

out to cash. He testified that Turrell had authority to stamp one of the checks here concerned as it was stamped and take it to the bank and deposit it, also that he would have had authority, after making such deposit, to write a check for cash and to withdraw the amount thereof. Mr. Louisson testified that he learned of the fraud committed by taking these checks and cashing them instead of endorsing them from the confession of Mr. Turrell on May 27th or 28th, 1920, and that Plaintiff did not notify the Defendant until it had ascertained the facts and gotten the amount to notify them about, notice being first given on July 20, 1920. He testified that no one checked Mr. Turrell's work except the auditors in their annual audit; that Mr. Turrell was the only one that had to do with examining all returned bank statements and vouchers; that no one else examined said statements except at the annual audit. He testified that the first check wrongfully cashed by Turrell was in December, 1919; that the same was not discovered at the audit in January, 1920, the reason being that the discrepancy was not sufficient to attract attention, the fire destroying the records of Plaintiff's Portland branch occurring December 3, 1920. He testified that a check coming from a Spokane or Seattle branch of Plaintiff's business to the Portland branch would have been noted on the books of the Portland branch if the check had gone through the usual channel and Turrell had been honest; but that in regard to the checks concerned here, that Turrell made no entries of the charge or the check, the result being there was nothing on the books of the Portland

branch to show that the merchandise had been sent to Seattle and there was nothing on the books to show that Seattle had paid for the merchandise. If it had not been for Mr. Turrell's dishonesty, such entries would have appeared in the usual course of business. Mr. Louisson testified that in some instances when a check would come for merchandise, that had been sold one of the other branches, the check would be deposited but Turrell would immediately draw cash checks against it and wipe out the transaction; that Turrell had authority to draw checks on the Plaintiff's account and such checks were shown by return statements and vouchers from Defendant to Plaintiff; that such actions by Turrell were not discovered because Turrell examined the statements and vouchers. He testified that the embezzlements occurring in the latter described manner were not discovered upon the return of statements and vouchers, but that there was more chance of discovering embezzlements in this manner than the embezzlements by cashing out of town checks.

On redirect examination, Mr. Louisson testified that embezzlements accomplished by Turrell through drawing checks to cash and cashing them were first discovered and that embezzlement accomplished by cashing out of town checks were not discovered except through Mr. Turrell's confession. He testified, further, that when the drawee banks cashed the checks here concerned, that they were probably returned to the Spokane and Seattle branches as cancelled vouchers in regular course and that there was nothing on the checks to call the

attention of the Spokane & Seattle branches to any irregularity. He testified that in the regular course of business of the plaintiff's Portland branch, there was no occasion for the drawing of large checks to cash, and that prior to the discovery of these embezzlements he had not known of Turrell's having drawn any such checks.

On re-cross examination, Mr. Louisson testified that interchange of statements between the various branches were had regularly and that by such interchange the embezzlements of Turrell, accomplished by the cashing of the checks in question, would have been discovered if Turrell had not himself received and made out said statements and thereby prevented the discovery of the fraud. Using one of the checks drawn on the Seattle bank as an example, Mr. Louisson testified that when Turrell took it to the defendant bank and cashed it the defendant bank sent the check to the drawee bank at Seattle. The drawee bank charged the amount to the General Cigar Company's account and returned the cancelled check to the Seattle office of the General Cigar Company. This informed the Seattle branch of the General Cigar Company that the check had passed from its Portland branch to the defendant bank. Mr. Louisson further testified that there was an interchange of statements between the different branches of the General Cigar Company but that Turrell manipulated the statements going out from and coming in to the Portland office in such a way as to cover up the discrepancies, and Turrell kept off the books of the Portland office all records of merchandise

sent from the Portland branch to the Seattle and Spokane branches.

Mr. Louisson testified that it was manipulation by Turrell of the records and statements of the General Cigar Company that prevented the discovery of Turrell's practice of cashing the checks in question instead of depositing them.

On re-direct examination he testified that each of the branches were run as a separate and distinct unit, practically as different businesses, that the various branches reported to the San Francisco office which was the audit center, and that the books of each branch were audited annually the first of each year.

L. M. BEACH, Witness for Plaintiff.

Mr. L. M. Beach was called by plaintiff and testified that in 1920 he was Assistant Cashier and stock man of the Portland Branch of the General Cigar Company, that in that position he generally attended to the making of deposits. That Turrell opened the mail containing checks and gave him, Beach, the entries to be made and checks to be deposited; that he, Beach, usually affixed the rubber stamp to the checks which were to be deposited, but sometimes this was done by the bookkeeper or stenographer or whoever happened not to be busy at the time. Mr. Beach testified that he was present when the special accountants did their work in January, 1921, and that when an effort was made to find returned checks and statements at that time, Turrell made the explanation that they were burned in the fire. On Cross-Examination Mr. Beach testified that at times Mr. Tur-

rell used the rubber stamp for endorsement and at times made deposits in the Defendant bank.

H. T. SHORT, Witness for Plaintiff.

Mr. H. T. Short was called as a witness by Plaintiff and testified that he held the office of Comptroller in Plaintiff corporation and had had extensive accounting experience and was acquainted with the practice with regard to endorsements. He testified the usual procedure of endorsement for deposit was to make endorsement with a rubber stamp endorsement, payable to the order of the Bank and check is naturally passed to the credit of the concern who is depositing it, that the rubber stamp is placed upon a check by almost any one in the office, often the office boy; that the endorsement is used for the protection of the depositor company, the check so endorsed will be placed to the credit of the endorser, not cashed.

NEIL W. TURRELL, Witness for Plaintiff.

Mr. Neil W. Turrell was called as a witness by Plaintiff. He testified that he acted from July 1, 1919, to January 1, 1921, as Cashier of the General Cigar Company, that he handled the monthly statements from the Defendant bank during that time, that the regular practice in regard to checks coming from out of town branches was to affix the regulation rubber stamp on the reverse of the check and deposit same; that his irregular practice was to so endorse said checks and cash same at defendant bank, that in cashing them he was not required to sign as Cashier when he cashed them, but on one occasion was required to sign his own name,

underneath the rubber stamp endorsement. The checks that he cashed in this manner represented, he testified, payment from other branches of Plaintiff Company; that the books did not show the irregularity because he took care of that in sending statements to the other branches and that he did not put the charge for the merchandise which the checks paid for on the books of the General Cigar Company at Portland, the result being that the transaction did not show on the books. He testified to a conversation subsequent to his arrest with Mr. Arthur Jones, Vice-President of Defendant Bank, in which Mr. Turrell stated that Jones said to him "that he thought it was very—, a peculiar thing that they had cashed these checks because they had all been expressly ordered not to do that sort of thing."

On cross examination, Mr. Turrell testified that he was pretty well known at the bank and that he was known at the defendant bank as the cashier of plaintiff company; that the only dealings he had with defendant constituted taking up deposits, getting drafts and drawing checks; that he did not re-deposit any of the moneys he obtained from these checks to the account of the First National Bank.

On re-direct examination, he testified that he never had any dealings with the defendant in the way of borrowing money or signing notes or other executive dealings with them.

W. L. THOMPSON, Witness for Defendant.

The plaintiff rested and W. L. Thompson was called as witness in behalf of defendant. He testified that he was Vice-President of First National Bank and Chair-

man of the Committee on Rules and Regulations of the Portland Clearing House; that there was no rule of the Portland Clearing House to the effect that an endorsement such as the endorsements made on the checks here involved should be used for deposit only, and that such endorsement was frequently used in payroll checks, that is, checks are endorsed payable to endorser and with rubber stamp endorsement and the cashier, or whoever represents the customer, presents it at the windows and gets the cash on it; that many firms use the particular stamp as an indorsement for deposit but most of them use a restrictive endorsement "For Deposit Only."

On Cross Examination, Mr. Thompson testified that it was unnecessary to make an inquiry as to the authority of the person presenting a check so endorsed for deposit when deposited, as in that case the check would go to the credit of the endorser and that it was immaterial whether the stamp was affixed by bookkeeper, president, cashier or stenographer for that matter, but that the check would be cashed only for the authorized representative of the account with the bank; that the never knew of the General Cigar Company's having any payroll check.

A. O. JONES, Witness for Defendant.

Mr. A. O. Jones was called as a witness on behalf of the defendant and testified that he was Vice-President of defendant company and denied that he made a statement to Mr. Turrell that Tellers had been instructed not to cash checks such as the ones here concerned.

EXCEPTION NO. 1

On Cross Examination Mr. Jones was asked:

“Mr. Jones, are you sure you did not make the statement to him that that was something which was done absolutely against the instructions and orders of the bank?

A. I positively did not say anything about it, Mr. Nelson, I had just one purpose in having Mr. Turrell come down to the bank. I called him from his home.

Q. Do you remember making that statement to Mr. Louisson?

A. About what?

Q. That this practice was absolutely contrary to the orders and instructions of the bank?

A. Not that I remember of, no.

Q. You don't remember telling Mr. Louisson?

A. No, sir.

Q. That it was the bank's fault?

A. No, sir, I did not.

Q. And that the bank ought to make this good?

A. I did not. I certainly would not.

Q. You know Mr. Louisson, don't you?

A. Well, I should say so.

Q. Do you remember talking to him on two different occasions?

Mr. Gearin: Did Louisson testify to that?

Mr. Nelson: No, Louisson didn't testify to that, but he will testify to it.

Q. Do you remember talking to him on two dif-

ferent occasions, Mr. Jones, at the bank and telling him that this was something which absolutely should never have been done, that the bank was at fault, and ought to pay it?

A. I did not.

Q. You did not?

A. No, sir.

Excused.

Mr. Freed: We rest, your Honor.

JULIUS LOUISSON Recalled in rebuttal for plaintiff.

DIRECT EXAMINATION

Mr. Gearin: If you are going into that question, I object to the question. It was not proper cross-examination. It was immaterial matter, and they cannot call a witness now to contradict that one.

Mr. Nelson: No objection on the ground it was not proper cross-examination, your Honor, and it is an admission against interest, developed from a witness for the defendant in trying to refresh his recollection whether he had not made this statement to Turrell, whether he had not made similar statements to others. I have the right to ask the question to show conflicting statements.

Mr. Gearin: This is not rebuttal.

Mr. Nelson: This is your witness.

COURT: I will overrule the objection.

Questions by Mr. Nelson: Mr. Louisson, are you acquainted with Mr. Arthur Jones, Vice-President of

the First National Bank?

A. Yes, sir, I know him very well.

Q. The Gentleman who was just on the stand?

A. Yes, sir.

Q. I wish you would just answer this question Yes or No, if you will. Will you state whether or not, on either one or two occasions, you had a discussion with Mr. Arthur O. Jones, Vice-President of the First National Bank, with reference to these checks, in the course of which he made the statement that they were cashed absolutely against the rules and practices of the bank and that the bank was at fault, and should pay it without a fight?

Mr. Gearin: Objected to.

COURT: That is not exactly what was stated. It seems to me you will have to have the reporter read what was stated.

Q. Will you please consider I am incorporating in this question now just the language I used in asking questions to Mr. Jones? Now state whether or not Mr. Jones, on either one or two occasions, ever made the statement to you that the cashing of these checks was not in conformity to the practices, and against the orders of the bank, and that the bank was at fault, and ought to pay?

Mr. Gearin: I object to that, if the court please, as incompetent and immaterial, and not rebuttal. It was drawn out by themselves, and they cannot build up a man of straw here to tear him down again.

COURT: It was asked for the purpose of im-

peachment?

Mr. Nelson: Yes.

COURT: And that question was put to the witness Mr. Jones. It was asked for the purpose of impeachment. I think it is relevant and competent. I will overrule the objection.

Mr. Gearin: Save an exception.

Q. Answer the question Yes or No.

A. The words were not exactly the same, but it meant the same.

COURT: That is as far as you can go.

A. Not the same words.

Q. Will you state whether the substance was what was given you?

COURT: I think that is as far as you can go.

Mr. Gearin: You cannot impeach on substance.

Mr. Nelson: Will your Honor permit me to call Mr. Jones for one question? I did not know the exact words. I would like to know whether he said the substance of that to Mr. Louisson.

COURT: I suppose you might probably put the substance.

Mr. Nelson: Just that one question.

Excused.

A. O. JONES Recalled for further cross-examination.

Questions by Mr. Nelson:

Mr. Jones, will you state whether or not you said the substance of what I said to you to Mr. Louisson?

A. I had many conversations with Mr. Louisson on the subject. I told Mr. Louisson in many conversations we had about this matter that I was very, very sorry it happened, but I never told him the bank was liable in any way for paying these checks.

Q. You didn't either state the words which I used, or the substance of it, which amounts to this: That the practice was an irregular one and against the bank's instructions, and that the bank was at fault, and should pay the matter without suit? Did you state the substance of that to him?

A. We do a lot of little irregular things, seemingly, for the convenience of the customers, oftentimes, and I never told Mr. Louisson that the bank was responsible for this shortage.

Q. Did you say to him any part of what I have said to you?

COURT: I think that is going too far.

A. I told him I regretted the whole thing. I said "I am very sorry it has happened."

Q. You said the bank does irregular things, but you deny making any statement in substance of what I have said, to him?

A. I don't quite understand you, Mr. Nelson.

COURT: Those things must be specific, and when you speak of the substance of a thing, it must be very, very like, and you cannot go beyond that.

Mr. Nelson: My meaning, your Honor, is this, if I may reframe that:

Q. You understand, Mr. Jones, I am not attempt-

ing to give a stenographic report of a conversation.

A. Yes, I know.

Q. BUT did you say that, or did you say something which had the general purport of that?

A. The only thing I ever told Mr. Louisson was I was sorry the whole thing had happened; I regretted it.

Q. Mr. Jones, I will ask you this question: Did you say this or words in substance like these: "I don't see why the bank is contesting this matter. They are liable for it, and ought to pay it"?

A. No.

Q. You don't recall saying that?

A. I do not.

Mr. Gearin: I certainly object to this system of undertaking to impeach a witness. The rule is very strict upon it. They must give the time, place and persons present, and the substance of the identical conversation they are impeaching on. He is undertaking to lay a foundation for three different conversations.

COURT: I think this matter is too indefinite.

Q. Let me ask this: You remember conversing with Mr. Louisson in the First National Bank, Mr. Jones, do you not, on this subject?

A. Dozens of times, yes.

Q. On this particular subject?

A. Yes.

Q. And you don't remember these words, to this effect, being used in any of those conversations?

A. No, I don't.

Q. It would not do any good to tell you any particular date?

A. No, I don't. I really don't. If I did, I would tell you, but I don't.

Mr. Nelson: Now, I would like to recall Mr. Louis-son.

COURT: I will sustain the objection to that. You did not fix any time, place or persons present, or the exact matter that was spoken.

Mr. Nelson: If the court please, I would like to make an offer of proof in that regard, if I may.

COURT: You may make your offer of proof. You already have it in the record, the whole thing.

Mr. Nelson: That is understood, then. The proof I offer is that he did make those statements.

COURT: Very well.

Mr. Nelson: We may have an exception to the exclusion of that?

COURT: Yes, you may have your exception.

Mr. Nelson: We rest, your Honor."

* * * *

The parties having rested and arguments having been made to the Jury, the court instructed the Jury as follows:

Instructions.

"Gentlemen of the Jury:

Plaintiff has entered suit against the defendant to

recover on 11 counts or causes of action, two of which have been stricken from the complaint, namely, counts 7 and 8, one for \$29.75 and the other for \$29.43, leaving for consideration but nine counts, eliminating the 7th and 8th which will have nothing to do.

I will state the essential allegations of the first count or cause of action, only, as it is similar to all the rest, in order to give you the basis upon which the complaint is predicated.

On December 13, 1919, plaintiff, at Spokane, Washington, through its agents, engaged in conducting plaintiff's branch business in that city, drew its check on the Spokane & Eastern Trust Company, payable to itself, in amount \$1,293.58. The check was transmitted in the usual course to plaintiff's Portland branch, and was received by plaintiff's agent conducting its business in Portland, and was there indorsed for deposit as follows:

"Pay to the order of
First National Bank
335 Portland, Ore. 335
General Cigar Co. Inc.
M. A. Gunst Branch
M. A. Gunst & Co."

In this relation it is alleged that said special indorsement was one uniformly used by plaintiff for the purpose of deposit with defendant bank, and was in the form prescribed by it and by the Portland Clearing House Association, of which the defendant bank was a member, to be used for the purpose of deposit.

It is thereupon further alleged that N. W. Turrell, wrongfully and without authority from the plaintiff, converted the check to his own use, and transferred it to the defendant, and on or about December 18, 1919, defendant presented it to the bank on which it was drawn, which paid it to defendant and charged the amount to plaintiff, and defendant has never credited plaintiff therewith. By reason of these alleged facts, it is insisted that defendant received to its own use and benefit the money thus paid to it by the Spokane bank, and plaintiff demands payment therefor.

Some of the checks mentioned in the several causes of action were drawn by the Seattle branch upon a Seattle bank, but all of them took the same course, were indorsed in the same manner (save one), and were paid and charged in the same way. The one exception contained the name N. W. Turrell written underneath the indorsement. This variation in the indorsement does not in legal effect differentiate it from the rest.

The defendant, for answer, alleges that, prior to July 23, 1919, and since, plaintiff had, and has, three separate accounts with defendant, subject to be checked out or otherwise withdrawn by plaintiff or its duly authorized agent; that on the day last named plaintiff, in writing, authorized Julius Louisson and N. W. Turrell, or either of them, to demand and receive from defendant, and defendant to pay to these parties, or either of them, any moneys which plaintiff had in defendant's bank under any of such accounts; that Turrell was henceforth the agent of plaintiff, fully authorized to demand

and receive from defendant all the moneys in its bank standing in plaintiff's name; that Turrell, on behalf of and as the act of plaintiff, indorsed the check in manner as alleged in the complaint, which it is alleged was the customary form used by Turrell and plaintiff in indorsing checks, either for payment or deposit, and that Turrell was fully authorized by plaintiff so to indorse it; that Turrell, acting as plaintiff's agent, presented the check so indorsed to defendant, and requested defendant to pay it to him for plaintiff and to transmit it (the check) to the Spokane Trust Company, where it would be taken up and paid by that company and the amount charged to plaintiff's account; whereupon defendant paid to Turrell, as agent of plaintiff, the amount of the check; that by reason of the authorization mentioned Turrell had full authority from plaintiff to indorse the check in manner set out, and to collect and receive the money from defendant.

For a second answer, defendant sets out that Turrell had been in the habit of indorsing checks in the manner pointed out, and defendant, because of the authority vested in him by plaintiff, cashed such checks when so presented, and paid the money to Turrell for plaintiff, and the checks were thereupon paid to defendant by the drawee banks, and charged to plaintiff's account; that a proper audit or check of its books and business at Portland and Spokane and the accounts of Turrell would have disclosed to plaintiff the practice of Turrell; that during all the times mentioned there were monthly statements rendered and settlements made between

plaintiff and defendant, and between plaintiff and the Spokane bank, and at such settlements plaintiff's cancelled checks and itemized statements of plaintiff's accounts with the respective banks were returned to it by defendant and the Spokane bank, and an account stated was had between plaintiff and each of such banks; that plaintiff at no time prior to January 1, 1921, made objection to such payments by defendant, or claimed that Turrell was without authority to receive the money on the checks, and that plaintiff by its silence has ratified and confirmed the acts of Turrell in so indorsing and receipting the money upon such checks, and is now estopped to deny that Turrell had authority so to receive payment.

For a third answer, it is alleged that plaintiff learned of the fraud of Turrell long prior to July 20, 1921, but did not notify defendant thereof until that date; that because of such failure to notify defendant promptly of the fraud, defendant has been deprived of the opportunity to proceed against Turrell and thereby to obtain from him restitution for the wrong suffered until it was too late to recover anything.

The fourth answer is not for your consideration, but is for the court only. It is not essential, therefore, that you give it any attention.

The real issues presented for your consideration are few. On July 23, 1919, defendant was advised that "the signatures of Julius Louisson and N. W. Turrell (that is, either of them) are authorized to sign checks drawn on the following accounts:" There were three

of them, and they are named in the authorization. This authorization contained the signatures "Julius Louisson, Manager; N. W. Turrell, Cashier."

Nothing is said about the indorsement of checks and the form which it was to take. You will note that the crucial controversy here is touching Turrell's authorization by plaintiff to demand and receive payment of the checks from defendant. The defendant was unauthorized to pay out money on plaintiff's account to Turrell, unless Turrell was duly empowered by plaintiff, as its agent, to demand and receive the same.

That Turrell was agent for plaintiff in drawing checks against plaintiff's account with defendant is not questioned. But did the scope of his agency extend to demanding the cash upon checks indorsed in the manner these in suit were? The manner of indorsement seems to be one common in banking circles. Under the testimony, there seems to be two opinions respecting the custom of banks in acceding to the demands of an agent for payment in pursuance of such an indorsement. One affirms that it is usually done, and the other denies. The effect of the indorsement is that the bank pay to itself the amount of the check, so that the indorsement gives no authority for payment to the agent, or one presenting the check to the bank. Turrell's authority to demand payment must be deduced, if at all from the specific authority extended to him as cashier to draw checks, or the general authority arising from the exercise of the ordinary duties attending the office of cashier. The sheer authority to draw checks can scarcely authorize

a demand and receipt of funds on an indorsement directing payment to the order of the bank. It will be necessary to look further than that authorization alone, although it will be pertinent to take into account such authority, along with other matters which you will consider, in order to determine the real scope of Turrell's agency. The fact that Turrell was cashier for plaintiff counts for something, and you may inquire under the evidence, to what extent the duties of the office as cashier authorized Turrell to act, and whether it comprised the authority to demand and receive payment on checks indorsed as these were.

In this relation, you will take into account the custom of banks in Portland, first ascertaining from the evidence what it is, as it respects paying money to agents upon indorsements in that form. So it is you must ascertain and determine the scope of Turrell's authority as plaintiff's agent to demand and receive the money from defendant bank on checks so indorsed, as these were, from all the testimony adduced bearing upon the subject, and say whether he possessed such authority or not. If he did possess such authority, that ends this case, and your verdict should be for the defendant. If, however, you say that he did not, then you will consider other matters which I will explain to you. In this relation, I give you this further instruction:

If one holds out to the world and accredits a person as his agent, he is bound by that person's acts done within the scope of the agency thus given him. In such cases, the question is, not what authority was intended to be

given to the agent, but what authority was the third person dealing with him justified from the acts of the principal in believing was given to him.

I will repeat it in somewhat different language:

When one holds another out to the world as his agent, in determining the liability of the principal, the question is, not what authority was intended to be given to

So you may consider and determine what, if anything, plaintiff has done in holding out to all persons and accrediting Turrell as its agent, and the scope of the agency, and say whether the defendant was justified therefrom in dealing with Turrell as it did, believing he was thus authorized by plaintiff to draw the funds.

It is a general principle that that party should bear the loss whose conduct makes the loss possible. If you believe from the evidence that Turrell did not have actual authority to receive the money on the checks described in the pleadings for the General Cigar Company, but that the General Cigar Company by the exercise of reasonable care in the conduct of its business should have discovered Turrell's practice in cashing its checks at the defendant bank, and if you believe that the General Cigar Company did not prior to January 1, 1921, make claims to the defendant bank that Turrell had no such authority, you must find for the defendant bank on all the causes of action involving the checks after the time when the General Cigar Company should have discovered Turrell's said practice.

This disposes of the first further and separate answer.

As it respects the second answer, it is a rule of law that a depositor must examine the bank's periodical statements and report to the bank without any unreasonable delay any errors he may discover, or the bank may regard his silence as an admission that the entries as shown are correct.

It is alleged, among other things, that at all times from July 23, 1919, to December 15th of the same year, the plaintiff, in addition to the three accounts carried in the defendant bank, carried accounts in the Spokane & Eastern Trust Company, of Spokane, and the Union National Bank, of Seattle, and that each of these banks, including the defendant bank, rendered a monthly statement to plaintiff of its account therewith; that thereby the plaintiff was advised as to the exact condition of its accounts in each of these banks, respectively, touching the amounts of money drawn from the bank by Turrell, but made no objection thereto, and gave the bank no information touching any irregularity affecting such accounts.

If you find from the evidence in the case that such were the facts, and that the plaintiff was so advised and filed, within a reasonable time, to advise the defendant bank of such irregularities, then the plaintiff would be estopped now to assert that defendant was liable for its acts in paying the money over to Turrell in pursuance of his request or demand, and your verdict should be for the defendant.

And in this relation, I further instruct you that a depositor who has permitted his agent to verify the

bank's statements is charged with notice of the fraud which would be disclosed by the examination of such statements, though not with the agent's knowledge of the fraud which he may have acquired otherwise than through such statements.

If you believe from the evidence a reasonably careful examination of the monthly statements rendered and cancelled vouchers returned to the plaintiff General Cigar Company, by the defendant, First National Bank, and the Spokane and Eastern Trust Company, would have disclosed to the General Cigar Company the fact that the checks involved in the first, fourth, fifth and ninth causes of action had not been credited to the General Cigar Company's account with the First National Bank and if you also believe that prior to July 20, 1921, the General Cigar Company made no objections concerning plaintiff's account with defendant or the cashing of these checks, you must find for the defendant on the first, fourth, fifth and ninth causes of action.

If you believe from the evidence that a reasonably careful examination of the monthly statements rendered and cancelled vouchers returned to the plaintiff by the First National Bank and the Union National Bank would have disclosed to the General Cigar Company the fact that the checks involved in the second, third, sixth, tenth and eleventh causes of action had not been credited to the General Cigar Company's account with the First National Bank, and if you also believe that prior to July 20, 1921, the General Cigar Company made no objections concerning plaintiff's account with defend-

ant or the cashing of these checks, you must find for the defendant on the second, third, sixth, tenth and eleventh causes of action.

I instruct you that, in order for a person to be called upon to object to a wrongful or unauthorized course of practice it is necessary that he know the facts and know the practice, or that a reasonably prudent person or concern under similar circumstances would have had such knowledge in an ordinarily intelligent conduct of his or its affairs. The question therefore becomes one of fact for you to determine, and the burden of proof in this regard is also upon the defendant, First National Bank, to show that the General Cigar Company, by giving in the matter of the Seattle and Spokane checks the attention and care which a reasonably prudent person under similar circumstances would have given them, would have discovered sooner than the General Cigar Company did discover, the method in which cash was withdrawn from the defendant bank on said out of town checks. The test in this regard is not what would have been discovered by the highest conceivable degree of care or by the investigation of a person abnormally suspicious, but only the care which an ordinarily prudent person or concern may reasonably be held to be bound to devote to its business and affairs under similar circumstances.

As it appertains to the third further and separate answer, I instruct you that, if you believe from the evidence that plaintiff learned on or about May 28, 1921, of Turrell's fraud in connection with the moneys re-

ceived from defendant bank on the checks involved here, and you further believe that plaintiff did not promptly notify the defendant that plaintiff would hold it responsible for such moneys paid to Turrell, then you will find for the defendant. Prompt notification would be such as a prudent man would exercise within a reasonable time, so as to advise of the situation.

Now, gentlemen of the jury, I instruct you further that the burden of proof lies with the plaintiff to show that the defendant bank paid out money without authority from the plaintiff, either real or apparent.

Defendant has the burden of proof of showing that plaintiff was advised by statements of account of Turrell's fraud and failed to notify defendant of its knowledge within a reasonable time.

The burden of proof, gentlemen, is simply the weight of the testimony. It is such weight as would carry the scales of justice down upon one side or the other; and in considering the question as to whether these parties have made out their case by the burden of proof, as I have mentioned to you you will determine whether the weight of testimony is upon that side.

The Jury are the judges of the effect of the evidence. The court gives you the law, and you take that from the court and apply it implicitly, but when it comes to determining what the testimony proves, that is within your function, and not within the function of the court.

A witness is presumed to speak the truth, but that presumption may be overcome by the character of the testimony and by the manner in which the testimony

is given, or by testimony affecting the character or the motives. A person found to be false in one particular is to be distrusted in all.

So you may take into consideration the interest that a witness may have in the outcome of the suit in hand, and also any other evidence that may seem to affect his credibility. And in this way you will determine the credibility of the witnesses, and when you have determined that, you will be the better enabled to say what your verdict shall be in the end.

I will say to you, further, that in considering this case you will take into consideration all the testimony in the case bearing upon the particular subject which you may have under consideration. You will consider all the testimony, whether adduced by the plaintiff or the defendant, and compare the different parts thereof one with another, so that you may be able to say, from the entire record, where your verdict should lie and what it should be.

If you find for the plaintiff, gentlemen, you will find the several amounts which are mentioned in the prayer of the complaint, with interest due as there demanded, save and except you will not find the amounts which are named in the seventh and eighth causes of action. You will readily understand the prayer as it affects those two counts.

If you find for the defendant, of course, your verdict will simply be for the defendant.

EXCEPTION NO. 2

An exception was saved by Plaintiff to that part of the charge to the effect that if the jury believed from the evidence that Turrell did not have authority to cash the checks, but if they further believed from the evidence the General Cigar Company should have detected the fraud by reasonable diligence, then the jury must find for the defendant in regard to those checks which were cashed if the General Cigar Company should have caught the practices of Turrell.

The part of the charge to which this exception has particular reference is as follows:

“It is a general principle that that party should bear the loss whose conduct makes the loss possible. If you believe from the evidence that Turrell did not have actual authority to receive the money on the checks described in the pleadings for the General Cigar Company but that the General Cigar Company by the exercise of reasonable care in the conduct of its business should have discovered Turrell’s practice in cashing its checks at the defendant bank, and if you believe that the General Cigar Company did not prior to January 1, 1921, make claims to the defendant bank that Turrell had no such authority, you must find for the defendant bank on all the causes of action involving the checks cashed after the time when the General Cigar Company should have discovered Turrell’s said practice.”

EXCEPTION NO. 3.

Plaintiff saved an exception to that part of the charge that if the Plaintiff should have detected the fraud by an examination of the vouchers returned from the First National Bank, it would be precluded from recovery on the ground that there is no evidence to justify any such finding by the jury. Reference is made to Exception No. 5, *Infra* and to the Digest of Testimony hereinbefore set out.

EXCEPTION NO. 4.

Plaintiff saved an exception to that part of the charge which is to the effect that if the jury should find that by return of the vouchers to the Spokane branch from the Spokane bank with reasonable diligence they should have discovered that the fraud existed and did not discover it, they would be estopped from asserting a claim against the defendant, as far as checks drawn upon the Spokane bank are concerned. Reference is made to Exception No. 5 *Infra* and to the Digest of Testimony hereinbefore set out.

EXCEPTION NO. 5.

Plaintiff saved an exception to a similar instruction with respect to vouchers from the Seattle bank with regard to the checks which were drawn on the Seattle bank.

The ground for the last two exceptions were stated to be that there were no facts in the case to justify such a finding by the jury of lack of diligence in that regard,

and also on the further ground that the delay could not have injured the defendant in regard to a past transaction, namely the past fraud.

The parts of the instruction to which these exceptions that is, the third, fourth and fifth exceptions, particularly refer, are as follows:

“As it respects the second answer, it is a rule of law that a depositor must examine the bank’s periodical statements and reports to the bank without any unreasonable delay any errors he may discover, or the bank may regard his silence as an admission that the entries as shown are correct.

“It is alleged, among other things, that at all times from July 23, 1919, to December 15th, of the same year, the plaintiff, in addition to the three accounts carried in the defendant bank, carried accounts in the Spokane and Eastern Trust Company, of Spokane, and the Union National Bank, of Seattle, and that each of these banks, including the defendant bank, rendered a monthly statement to plaintiff of its account therewith; that thereby the plaintiff was advised as to the exact condition of its account in each of these banks, respectively, touching the amounts of money drawn from the bank by Turrell, but made no objection thereto, and gave the bank no information touching any irregularity affecting such accounts.

“If you find from the evidence in the case that such were the facts, and that the plaintiff was so advised and failed, within a reasonable time, to ad-

wise the defendant bank of such irregularities, then the plaintiff would be estopped now to assert that defendant was liable for its acts in paying the money over to Turrell in pursuance of his request or demand, and your verdict should be for the defendant.

“And in this relation, I further instruct you that a depositor who has permitted his agent to verify the bank’s statements is charged with notice of the fraud which would be disclosed by the examination of such statements, though not with the agent’s knowledge of the fraud which he may have acquired otherwise than through such statements.

“If you believe from the evidence a reasonably careful examination of the monthly statements rendered and cancelled vouchers returned to the plaintiff General Cigar Company by the defendant First National Bank and the Spokane and Eastern Trust Company, would have disclosed to the General Cigar Company the fact that the checks involved in the first, fourth, fifth and ninth causes of action had not been credited to the General Cigar Company’s account with the First National Bank and if you also believe that prior to July 20, 1921, the General Cigar Company made no objections concerning plaintiff’s account with defendant or the cashing of these checks, you must find for the defendant on the first, fourth, fifth and ninth causes of action.

“If you believe from the evidence that a rea-

sonably careful examination of the monthly statements rendered and cancelled vouchers returned to the plaintiff by the First National Bank and the Union National Bank would have disclosed to the General Cigar Company the fact that the checks involved in the second, third, sixth, tenth and eleventh causes of action had not been credited to the General Cigar Company's account with the First National Bank, and if you also believe that prior to July 20, 1921, the General Cigar Company made no objections concerning plaintiff's account with defendant or the cashing of these checks, you must find for the defendant on the second, third, sixth, tenth and eleventh causes of action."

Reference is made to the Digest of Testimony hereinbefore set out.

EXCEPTION NO. 6.

Plaintiff also saved an exception to that part of the instruction which said that the burden of proof was on the Plaintiff to show that money had been paid by the Defendant without authority to the Plaintiff's agent on the ground that the burden should be on the Defendant to establish payment to the person authorized.

The parts of the Instructions to which this objection has particular reference are as follows:

"Now, gentlemen of the jury, I instruct you further that the burden of proof lies with the plaintiff to show that the defendant bank paid out money

without authority from the plaintiff, either real or apparent.

“The burden of proof, gentlemen, is simply the weight of the testimony. It is such weight as would carry the scales of justice down upon one side or the other; and in considering the question as to whether these parties have made out their case by the burden of proof, as I have mentioned to you, you will determine whether the weight of testimony is upon that side.”

Reference is made to the Digest of Testimony hereinafter set out.

EXCEPTION NO. 7.

Exception was allowed for refusal to give Plaintiff's duly requested instruction, as follows:

“This is an action instituted by General Cigar Company, Inc., a corporation, against First National Bank of Portland, Oregon, a National Banking corporation. It is admitted that both the Plaintiff and Defendant are incorporated as alleged.

“There are several causes of action in the Plaintiff's Complaint and inasmuch as the Answer to each and the Reply to the Answer involve precisely the same issues, I will simply take the first of these and you will understand that what I have to say as to the first applies with equal force to each of the others.

“The General Cigar Company conducted a wholesale and retail cigar and tobacco business in

the City of Portland, Oregon, and the same corporation had a branch at Spokane, Washington, engaged in a similar line of business. The Spokane branch being indebted to the Portland branch for merchandise, issued its check payable to the General Cigar Company, Portland, Oregon, in the sum of \$1293.58. This check was drawn on the Spokane and Eastern Trust Co., a banking corporation of Spokane, Washington. The check was received at the Portland office and there was endorsed upon the check by rubber endorsement the following:

“ ‘Pay to the order of First National Bank

335 Portland, Oregon 335

General Cigar Co., Inc.

M. A. Gunst Branch

M. A. Gunst & Co.’ ”

“I instruct you that the effect of affixing such a stamp to the back of a check is to make the check payable to a special banking corporation, namely the First National Bank, of Portland, Oregon, and is a method of endorsement commonly utilized for purposes of deposit, and had been so utilized throughout the dealings of the General Cigar Company with the First National Bank.

“It further appears that one Neil W. Turrell, Cashier of the General Cigar Co., had by virtue of a letter or power of attorney from the General Cigar Co., lodged with the First National Bank in July, 1919, been specifically authorized to sign checks on the funds of the General Cigar Co. or deposit

with the First National Bank. Turrell took the Spokane check which I have described to you, endorsed as I have said, to the Defendant First National Bank, and the Defendant First National Bank, to which the check was made payable by endorsement, paid the face amount thereof in cash to the said Turrell, and then in turn collected the amount of the check from the Bank on which it was drawn, that is, the Spokane and Eastern Trust Company at Spokane. It is admitted that the Bank did not credit the amount of the check to the General Cigar Company's account at Portland, Oregon, and that unless the Bank had authority to pay the cash to Turrell and unless the payment to Turrell was in law and in fact a payment to the General Cigar Company, or unless you should find the bank is released from liability because of other matters to which I shall hereafter advert, the General Cigar Company has not been paid and the First National Bank is indebted to it in the amount of the check. Whether or not such liability exists is the question for you in this case, and it becomes necessary for me to explain to you how an agency is created, what authority an agent ordinarily has, and what are the respective rights and duties of the depositor and of the Bank."

Reference is made to the Digest of Testimony hereinbefore set out.

EXCEPTION NO. 8.

Exception was taken and allowed for failure to give Plaintiff's duly requested instruction, as follows:

"I instruct you that when a negotiable instrument, such as the check in the case at bar, is endorsed specifically to a banking corporation, that the party having physical possession of such a check has not from the possession of such check alone, any authority to negotiate the same or receive the proceeds thereof."

Reference is made to the Digest of Testimony hereinbefore set out.

EXCEPTION NO. 9.

Exception was taken and allowed for failure to give Plaintiff's duly requested instruction, as follows:

"I instruct you that an agent has the authority which is actually formally and expressly conferred upon him and the power necessary to carry his instructions into effect, and also such powers as he is held out by the principal to the world and to those dealing with him as having. The principal has a right to limit and define this authority and when he does so limit it, the agency for those particular purposes, at least, becomes a special agency, and all persons must have regard to the limitations imposed, and if they deal with the agent on such a special field of agency in any other way than the way prescribed by the principal, the principal is not ordinarily bound. In this case it is not disputed that there was conferred upon the agent, Tur-

rell, by a letter or power of attorney, certain specific authority with reference to checks, i. e., the authority to sign checks on certain designated accounts and to sign these checks in a certain designated way, that is, as Cashier. That thereupon it became the bank's duty to the principal, the General Cigar Company, to decline to cash any checks on the funds of the depositor save and except those executed in the manner specified in the power of attorney, unless it has been shown to you that other or broader authority was conferred in some effective manner."

Reference is made to the Digest of Testimony hereinbefore set out.

EXCEPTION NO. 10.

Exception was taken and allowed for failure to give Plaintiff's duly requested instruction, as follows:

"I instruct you that the letter or power of attorney was silent on the subject of endorsements; that the rubber stamp endorsement making a check received by a depositor on an out of town bank payable to the order of the local bank in which he deposits, is one not required to be affixed by the principal himself or by any one holding any special powers and passes title to the fund to the depository bank alone. When the check is so stamped and is deposited with the bank to which it is made payable, by the rubber stamp endorsement, it is placed to the credit of the depositor and no question ordinarily arises as to the individual or the authority

of the individual affixing the rubber stamp.”

Reference is made to the Digest of Testimony hereinbefore set out.

EXCEPTION NO. 11.

Exception was taken and allowed for failure to give Plaintiff's duly requested instruction as follows:

“In this case it is claimed by the Defendant bank that the rubber stamp which I have described was used for another purpose than that of deposit, that is, that it was used for the purpose of obtaining cash over the counter and that Turrell, to whom I have referred, had authority from the Plaintiff, General Cigar Co., to obtain through the use of said rubber stamp endorsement, cash from the Defendant bank on checks received by the General Cigar Co. drawn on out of town banking institutions. I instruct you that the burden of proof is on the defendant First National Bank, to show that Turrell had the authority which the bank claims. There is no presumption of such authority. Neither the letter of July, 1919, authorizing Turrell to sign checks, nor the fact that he or other employees could stamp out of town checks payable to the order of the First National Bank creates of itself any authority on Turrell to obtain cash on such facts and it is incumbent upon the Defendant, First National Bank, seeking to justify payment of cash to Turrell thereon, to prove to you by a preponderance of evidence that Turrell had such authority.

“In considering the question of whether or not such authority existed, you are not only entitled, but it is your duty to consider all the facts in testimony and the circumstances surrounding the parties and attending the transactions and to determine from such a consideration whether or not the bank has established Turrell’s authority to cash said checks and the Bank’s right to pay them instead of placing them to the credit of its depositor, General Cigar Company. The Bank can justify itself and prevent a recovery of this case only by proving that the money was placed to the credit of the General Cigar Company or was otherwise used for the benefit of the General Cigar Company, and, it being admitted that it was not credited to the General Cigar Company but was paid to Turrell, the Bank must show that when it made a payment to Turrell it was under Turrell’s authority paying the money to the General Cigar Company.”

Reference is made to the Digest of Testimony hereinbefore set out.

EXCEPTION NO. 12.

Exception was taken and allowed for failure to give Plaintiff’s duly requested instruction, as follows:

“I instruct you that the letter or power of attorney of July, 1919, clearly required the signature for the General Cigar Co. of two persons, Julius Louisson, the manager, or Neil W. Turrell, cashier, and that meant their signature in a representative

capacity, as manager or cashier respectively, and not merely as individuals. There has been no testimony to show any authority to the Bank or any practice or course of dealing between the parties which would justify the bank in paying out cash on a rubber stamp signature without the personal signature of either the manager or cashier as such, unless it can be said that the payment of the amount of the several checks involved in this case to Turrell created and constituted, because of failure of the General Cigar Company, to object, such authority on the part of Turrell."

Reference is made to the Digest of Testimony hereinbefore set out.

EXCEPTION NO. 13.

Exception was taken and allowed for failure to give Plaintiff's duly requested instruction as follows:

"I instruct you that, in order for a person to be called upon to object to a wrongful or unauthorized course of practice it is necessary that he know the facts and know the practice, or that a reasonably prudent person or concern under similar circumstances would have had such knowledge in an ordinary intelligent conduct of his or its affairs. The question therefore becomes one of fact for you to determine and the burden of proof in this regard is also upon the Defendant, First National Bank, to show that the General Cigar Company, by giving in the matter of the Seattle and Spokane checks the

attention and care which a reasonably prudent person under similar circumstances would have given them, would have discovered sooner than the General Cigar Company did discover, the method in which cash was withdrawn from the Defendant Bank on said out of town checks. The test in this regard is not what would have been discovered by the highest conceivable degree of care or by the investigation of a person abnormally suspicious, but only the care which an ordinarily prudent person or concern may reasonably be held to be bound to devote to its business and affairs under similar circumstances."

Reference is made to the Digest of Testimony hereinbefore set out.

EXCEPTION NO. 14.

Exception was taken and allowed for failure to give Plaintiff's duly requested instruction as follows:

"In considering the question submitted to you by the foregoing instruction, I instruct you that the checks which form the basis of this action and for which Turrell received cash from the First National Bank were drawn on out of town banks other than the defendant bank. The statements received monthly by the Plaintiff from the Defendant bank indicated only the state of the Plaintiff's account with the Defendant bank and did not tend to indicate the state of the accounts on which the checks in question were drawn. Therefore, from an ex-

amination of those statements alone, the wrongful acts of Turrell in question would not be shown to the Plaintiff, nor could it thereby discover such wrongful acts of Turrell in cashing the checks in question. It would be necessary for the Plaintiff to check its accounts with the books of the out of town branches and the accounts that such branches had with the banks with which they did business. It is for you to determine as a question of fact whether the Plaintiff exercised reasonable care or was negligent in its system of checking the transactions between its Portland branch with the accounts from the various other branches. It is to be observed by you that the checks returned to the Spokane branch by the Spokane bank of deposit and to the Seattle branch by the Seattle bank of deposit, would not present any reason to believe that an irregularity had occurred since the Spokane and Seattle banks had a right, when receiving the checks through the First National Bank of Portland, with the approved rubber stamp endorsement of the General Cigar Company at Portland to the order of the First National Bank, to assume that these had passed through the hands of the First National Bank in a regular, proper and orderly manner and the Spokane and Seattle banks had the right to charge the amount of these checks against their respective depositors at those points."

Reference is made to the Digest of Testimony hereinbefore set out.

EXCEPTION NO. 15.

Exception was taken and allowed for failure to give Plaintiff's duly requested instruction as follows:

"The Defendant Bank as one of its defenses in this case asserts that the plaintiff, General Cigar Co., knew of the course of conduct on the part of Turrell with reference to the checks in suit, for a long time prior to communicating that knowledge to the Defendant Bank and that the bank was thereby deprived of an opportunity to recover all or a part of the loss. I instruct you that by facts stipulated in this case, it appears that all of Turrell's property was attached by the General Cigar Company at a time when it knew only of Turrell's embezzlement by means of checks payable to cash, not involved in this action, and that shortly thereafter the property so attached and all of Turrell's property acquired during the period of defalcation, was turned over to one J. H. Tipton as Trustee and that the question of the application of the proceeds of said property is one of law upon which this court will pass, the facts being admitted and it affirmatively appears from such admitted facts that no harm has resulted to the First National Bank by reason of any such alleged delay. I instruct you, therefore, to disregard the third further and separate defense on the subject of loss to the Bank through alleged delay in notifying it of the claim which is the subject of this action."

Reference is made to the Digest of Testimony hereinbefore set out.

EXCEPTION NO. 16.

Exception was taken and allowed for failure to give Plaintiff's duly requested instruction as follows:

“(If the instruction No. IX foregoing is refused by the Court, the Plaintiff desires to be allowed an exception to such refusal, and asks without waiving its objection to the denial of the foregoing, in the event of its refusal, that the following instruction be given):

“One of the defenses advanced by the Defendant bank is that the Plaintiff delayed unreasonably in informing it of the course of conduct on the part of Turrell with reference to the checks in suit. It was the duty of the Plaintiff General Cigar Co. within a reasonable time after ascertaining the facts, to communicate them to the Bank. The General Cigar Company had the right to make such inquiry as was necessary to ascertain the facts and was charged with the duty of making such inquiry with diligence. It could not be required to give notice as to the amounts claimed to have been diverted until, as a result of diligent inquiry, it had the opportunity to know them itself. In order to sustain this defense on the part of the bank, therefore, it must appear to you from a preponderance of the evidence that the General Cigar Company, after having reason to suspect the facts in connection with the checks in suit, delayed unreasonably in compiling the data on the subject and in communicating the result of its investigation and inquiry to

the First National Bank. If you believe that the first intimation on the subject came from Turrell's confession at the end of May, 1921, and that the wires were used in the effort to ascertain the facts and that copies of documents had to be procured from the various banks and an accounting and audit were essential, and that the data could not reasonably be compiled short of June 20th, at which date the bank was given formal notice of the amount of the several checks, then I instruct you that the General Cigar Company acted with reasonable diligence and the Bank cannot avoid liability under that defense."

Reference is made to the Digest of Testimony hereinbefore set out.

* * * *

Thereafter, on the 6th day of June, 1922, the jury rendered a verdict in favor of defendant and against plaintiff.

After judgment was entered upon said verdict and within the time allowed by the Court, Plaintiff moved for New Trial because of errors at law occurring at the trial and duly excepted to by the Plaintiff, the errors assigned being the rulings to which Exceptions II to XVI were taken as above stated, and on the additional ground "that the verdict is not in accordance with the weight of evidence in that the evidence required at the Jury's hands a finding in favor of the Plaintiff on cause of action arising before the rendering of any monthly statements or before the theory of

estoppel could be invoked because of failure to ascertain the facts as to Turrell's conduct and to act on such information."

Said motion was denied by the Court.

* * * *

And now that the foregoing matters and things may appear and remain of record in this cause, I, the undersigned Trial Judge, sitting at the trial of this action, sign and seal the foregoing Bill of Exceptions reserved by Plaintiff and I certify that the Exceptions alleged by the foregoing Bill to have been taken and allowed were duly taken and allowed as therein set forth after the Jury had been empanelled and while it was still at the Bar; that the foregoing Bill of Exceptions contains all of the evidence and proceedings had in the trial of said action; that the opinion and instruction of the Court is fully set out therein and no other or further instructions were given than as noted in said Bill; that this Bill was served, tendered and filed within the time allowed by law and the orders of this court therefor and the same is hereby accordingly settled, allowed and approved.

Dated this 14th day of November, 1922.

CHARLES E. WOLVERTON,

District Judge.

That on November 17, there was filed in said court the following:

PETITION FOR WRIT OF ERROR.

Comes now General Cigar Company, a corporation,

plaintiff herein, and says that on or about June 6, 1922, a verdict was rendered against your petitioner in this court and in favor of defendant, and that thereafter, on June 6th, 1922, a final judgment was rendered and entered in favor of defendant and against this plaintiff whereby it was adjudged that plaintiff take nothing by this action and that defendant recover its costs and disbursements herein, taxed at \$35.92; that in said judgment and proceeding had prior thereunto certain errors were committed to the prejudice of this plaintiff, all of which will appear more in detail from the assignment of errors which is filed with this petition.

WHEREFORE, feeling itself aggrieved thereby plaintiff prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals, in and for the Ninth Circuit; that plaintiff may be permitted to prosecute the same to said court for the correction of errors so complained of and herewith assigned; that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said court, and that an order be made allowing said writ of error and fixing the amount of the supersedeas bond which the plaintiff shall give, and that upon the giving of said bond, all further proceedings in this court be suspended until the determination of said writ of error by the United States Circuit Court of Appeals, for the Ninth Circuit.

DEY, HAMPSON & NELSON,
GEO. L. BULAND,

Attorneys for Petitioner in Error.

Service of the within petition, by receipt of a copy thereof, duly certified, is hereby accepted at Portland, Oregon, this 17th day of November, 1922.

DOLPH, MALLORY, SIMON & GEARIN,
EDGAR FREED,

Attorneys for Defendant.

On the 17th day of November, 1922, there was served and filed the following

ASSIGNMENT OF ERRORS.

Now comes plaintiff, General Cigar Company, a corporation, plaintiff in error in the above entitled cause, and in connection with its petition for writ of error therein, assigns the following errors which it avers occurred in the trial thereof, and upon which it relies to reverse the judgment entered herein.

I.

The court erred in overruling plaintiff's demurrer to defendant's third further and separate defense to plaintiff's first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh causes of action, said demurrer being on the ground and for the reason that said defense does not state facts sufficient to constitute a defense to said causes of action.

In this regard plaintiff states that it was under no duty to notify defendant of fraud on the part of its employee, N. W. Turrell, and further from said defense it does not appear that defendant suffered damage from lack of said notification.

II.

The court erred in not allowing plaintiff to recall Mr. Louisson for the purpose of impeaching defendant's witness Mr. Jones.

The ruling of the court on this exception and the offer of proof by Mr. Louisson is illustrated by the following extract from the bill of exceptions:

Mr. A. O. Jones was called as a witness on behalf of the defendant and testified that he was vice-president of defendant company and denied that he made a statement to Mr. Turrell that tellers had been instructed not to cash checks such as the ones here concerned.

EXCEPTION NO. 1.

On cross-examination Mr. Jones was asked:

Mr. Jones, are you sure you did not make the statement to him that that was something which was done absolutely against the instructions and orders of the bank?

A. I positively did not say anything about it, Mr. Nelson, I had just one purpose in having Mr. Turrell come down to the bank. I called him from his home.

Q. Do you remember making that statement to Mr. Louisson?

A. About what?

Q. That this practice was absolutely contrary to the orders and instructions of the bank?

A. Not that I remember of, no.

Q. You don't remember telling Mr. Louisson?

A. No, sir.

Q. That it was the bank's fault?

A. No, sir, I did not.

Q. And that the bank ought to make this good?

A. I did not. I certainly would not.

Q. You know Mr. Louisson, don't you?

A. Well, I should say so.

Q. Do you remember talking to him on two different occasions?

MR. GEARIN: Did Louisson testify to that?

MR. NELSON: No, Louisson didn't testify to that, but he will testify to it.

Q. Do you remember talking to him on two different occasions, Mr. Jones, at the bank and telling him that this was something which absolutely should never have been done, that the bank was at fault, and ought to pay it?

A. I did not.

Q. You did not?

A. No, sir.

Excused.

MR. FREED: We rest, your Honor.

JULIUS LOUISSON, recalled in rebuttal for plaintiff.

DIRECT EXAMINATION.

MR. GEARIN: If you are going into that

question, I object to the question. It was not proper cross-examination. It was immaterial matter, and they cannot call a witness now to contradict that one.

MR. NELSON: No objection on the ground it was not proper cross-examination, your Honor, and it is an admission against interest, developed from a witness for the defendant in trying to refresh his recollection whether he had not made this statement to Turrell, whether he had not made similar statements to others. I have the right to ask the question to show conflicting statements.

MR. GEARIN: This is not rebuttal.

MR. NELSON: This is your witness.

THE COURT: I will overrule the objection.

Questions by Mr. Nelson: Mr. Louisson, are you acquainted with Mr. Arthur Jones, vice-president of the First National Bank?

A. Yes, sir, I know him very well.

Q. The gentleman who was just on the stand?

A. Yes, sir.

Q. I wish you would just answer this question yes or no, if you will. Will you state whether or not, on either one or two occasions, you had a discussion with Mr. Arthur O. Jones, vice-president of the First National Bank, with reference to those checks, in the course of which he made the statement that they were cashed absolutely against the rules and practices of the bank and that the bank was at fault, and should pay it without a fight?

MR. GEARIN: Objected to.

THE COURT: That is not exactly what was stated. It seems to me you will have to have the reporter read what was stated.

Q. Will you please consider I am incorporating in this question now just the language I used in asking questions to Mr. Jones? Now state whether or not Mr. Jones, on either one or two occasions, ever made the statement to you that the cashing of these checks was not in conformity to the practices, and against the orders of the bank, and that the bank was at fault, and ought to pay?

MR. GEARIN: I object to that, if the court please, as incompetent and immaterial, and not rebuttal. It was drawn out by themselves, and they cannot build up a man of straw here and tear him down again.

THE COURT: It was asked for the purpose of impeachment?

MR. NELSON: Yes.

THE COURT: And that question was put to the witness Mr. Jones. It was asked for the purpose of impeachment. I think it is relevant and competent. I will overrule the objection.

MR. GEARIN: Save an exception.

Q. Answer the question, yes or no.

A. The words were not exactly the same, but it meant the same.

THE COURT: That is as far as you can go.

A. Not the same words.

Q. Will you state whether the substance was what was given you?

THE COURT: I think that is as far as you can go.

MR. GEARIN: You cannot impeach on substance.

MR. NELSON: Will your Honor permit me to call Mr. Jones for one question? I did not know the exact words. I would like to know whether he said the substance of that to Mr. Louisson.

THE COURT: I suppose you might probably put the substance.

MR. NELSON: Just that one question.

Excused.

A. O. JONES, recalled for further cross-examination.

Questions by Mr. Nelson: Mr. Jones, will you state whether or not you said the substance of what I said to you to Mr. Louisson?

A. I had many conversations with Mr. Louisson on the subject. I told Mr. Louisson in many conversations we had about this matter that I was very, very sorry it happened, but I never told him the bank was liable in any way for paying these checks.

Q. You didn't either state the words which I used or the substance of it, which amounts to this: That the practice was an irregular one and against the bank's instructions, and that the bank was at fault and should pay the matter without suit? Did you state the substance of that to him?

A. We do a lot of little irregular things, seemingly, for the convenience of the customers, oftentimes, and I never told Mr. Louisson that the bank was responsible for this shortage.

Q. Did you say to him any part of what I have said to you?

THE COURT: I think that is going too far.

A. I told him I regretted the whole thing. I said, "I am very sorry it has happened."

Q. You said the bank does irregular things, but you deny making any statement in substance of what I have said, to him?

A. I don't quite understand you, Mr. Nelson.

THE COURT: Those things must be specific, and when you speak of the substance of a thing, it must be very, very like, and you cannot go beyond that.

MR. NELSON: My meaning, your Honor, is this, if I may reframe that:

Q. You understand, Mr. Jones, I am not attempting to give a stenographic report of a conversation.

A. Yes, I know.

Q. But did you say that, or did you say something which had the general purport of that?

A. The only thing I ever told Mr. Louisson was I was sorry the whole thing had happened; I regretted it.

Q. Mr. Jones, I will ask you this question: Did you say this or words in substance like these:

"I don't see why the bank is contesting this matter. They are liable for it, and ought to pay it."

A. No.

Q. You don't recall saying that?

A. I do not.

MR. GEARIN: I certainly object to this system of undertaking to impeach a witness. The rule is very strict upon it. They must give the time, place and persons present and the substance of the identical conversation they are impeaching on. He is undertaking to lay a foundation for three different conversations.

THE COURT: I think this matter is too indefinite.

Q. Let me ask this: You remember conversing with Mr. Louisson in the First National Bank, Mr. Jones, do you not, on this subject?

A. Dozens of times, yes.

Q. On this particular subject?

A. Yes.

Q. And you don't remember these words, to this effect, being used in any of those conversations?

A. No, I don't.

Q. It would not do any good to tell you any particular date?

A. No, I don't. I really don't. If I did, I would tell you, but I don't.

MR. NELSON: Now, I would like to recall Mr. Louisson.

THE COURT: I will sustain the objection to that. You did not fix any time, place or persons present, or the exact matter that was spoken.

MR. NELSON: If the court please, I would like to make an offer of proof in that regard, if I may.

THE COURT: You may make your offer of proof. You already have it in the record, the whole thing.

MR. NELSON: That is understood, then. The proof I offer is that he did make those statements.

THE COURT: Very well.

MR. NELSON: We may have an exception to the exclusion of that?

THE COURT: Yes, you may have your exception.

III.

The court erred in instructing the jury that if it believed from the evidence that Turrell did not have authority to cash the checks in question, but if they further believed from the evidence the General Cigar Company should have detected the fraud by reasonable diligence, then the jury must find for the defendant in regard to those checks which were cashed after the General Cigar Company should have caught the practices of Turrell, the charge being in verbatim as follows:

“It is a general principle that that party should

bear the loss whose conduct makes the loss possible. If you believe from the evidence that Turrell did not have actual authority to receive the money on the checks described in the pleadings for the General Cigar Company, but that the General Cigar Company by the exercise of reasonable care in the conduct of its business should have discovered Turrell's practice in cashing its checks at the defendant bank, and if you believe that the General Cigar Company did not prior to January 1, 1921, make claims to the defendant bank that Turrell had no such authority, you must find for the defendant bank on all the causes of action involving the checks cashed after the time when the General Cigar Company should have discovered Turrell's said practice." (Bill of Exceptions, p. 107, *supra*.)

In this regard plaintiff states that there was no duty resting on plaintiff owing to defendant to exercise reasonable diligence.

IV.

The court erred in instructing the jury that if the plaintiff should have detected the fraud by an examination of the vouchers returned from the First National Bank it would be precluded from recovering.

The exact charge is set forth under the sixth assignment of error. The plaintiff states in this regard that there was no evidence showing that plaintiff, by such examination, should have detected the fraud of said Turrell.

V.

The court erred in instructing the jury that if they should find that from a return of the vouchers to the Spokane branch of plaintiff company from the Spokane Bank, plaintiff, with reasonable diligence, should have discovered that a fraud existed and did not discover it, that they would be estopped from asserting claim against the defendant so far as checks drawn upon the Spokane Bank were concerned.

The exact charge is set forth under the sixth assignment of error. Plaintiff states in this regard that there were no facts introduced in evidence to justify such a finding by the jury of lack of diligence, and also on the further ground that the delay could not have injured defendant in regard to the fraud occurring prior thereto. (Bill of exceptions, p. 108, *supra*.)

VI.

The court erred in instructing the jury that if they should find that from a return of the vouchers to the Seattle branch of plaintiff company from the Seattle bank, the plaintiff, with reasonable diligence, should have discovered that a fraud existed and did not discover it, that they would be estopped from asserting claim against the defendant so far as checks drawn upon the Seattle bank were concerned.

In this regard plaintiff states that there were no facts introduced in evidence to justify such a finding by the jury of lack of diligence, and also on the further ground that the delay could not have injured defendant

in regard to the fraud occurring prior thereto. (Bill of exceptions, p. 109, *supra*.)

The parts of the instructions to which assignments of error IV, V and VI relate, are as follows:

As it respects the second answer, it is a rule of law that a depositor must examine the bank's periodical statements and report to the bank without any unreasonable delay any errors he may discover, or the bank may regard his silence as an admission that the entries as shown are correct.

It is alleged, among other things, that at all times from July 23, 1919, to December 15th, of the same year, the plaintiff, in addition to the three accounts carried in the defendant bank, carried accounts in the Spokane & Eastern Trust Company, of Spokane, and the Union National Bank, of Seattle, and that each of these banks, including the defendant bank, rendered a monthly statement to plaintiff of its account therewith; that thereby the plaintiff was advised as to the exact condition of its account in each of these banks, respectively, touching the amounts of money drawn from the bank by Turrell, but made no objection thereto, and gave the bank no information touching any irregularity affecting such accounts.

If you find from the evidence in the case that such were the facts, and that the plaintiff was so advised and failed, within a reasonable time, to advise the defendant bank of such irregularities, then the plaintiff would be estopped now to assert that

defendant was liable for its acts in paying the money over to Turrell in pursuance of his request or demand, and your verdict should be for the defendant.

And in this relation, I further instruct you that a depositor who has permitted his agent to verify the bank's statements is charged with notice of the fraud which would be disclosed by the examination of such statements, though not with the agent's knowledge of the fraud he may have acquired otherwise than through such statements.

If you believe from the evidence a reasonably careful examination of the monthly statements rendered and cancelled vouchers returned to the plaintiff, General Cigar Company, by the defendant, First National Bank, and the Spokane & Eastern Trust Company, would have disclosed to the General Cigar Company the fact that the checks involved in the first, fourth, fifth and ninth causes of action had not been credited to the General Cigar Company's accounts with the First National Bank, and if you also believe that prior to July 20, 1921, the General Cigar Company made no objections concerning plaintiff's account with defendant or the cashing of these checks, you must find for the defendant on the first, fourth, fifth and ninth causes of action.

If you believe from the evidence that a reasonably careful examination of the monthly statements rendered and cancelled vouchers returned to the

plaintiff by the First National Bank and the Union National Bank would have disclosed to the General Cigar Company the fact that the checks involved in the second, third, sixth, tenth and eleventh causes of action had not been credited to the General Cigar Company's account with the First National Bank, and if you also believe that prior to July 20, 1921, the General Cigar Company made no objections concerning plaintiff's account with defendant or the cashing of these checks, you must find for the defendant on the second, third, sixth, tenth and eleventh causes of action.

(Bill of exceptions, pp. 109, 110, supra.)

VII.

The court erred in instructing the jury that the burden of proof was on the plaintiff to show that money had been paid by the defendant without authority to the plaintiff's agent. The instructions in this respect are as follows:

Now, gentlemen of the jury, I instruct you further that the burden of proof lies with the plaintiff to show that the defendant bank paid out money without authority from the plaintiff, either real or apparent.

The burden of proof, gentlemen, is simply the weight of the testimony. It is such weight as would carry the scales of justice down upon one side or the other; and in considering the question as to whether these parties have made out their case by

the burden of proof, as I have mentioned to you, you will determine whether the weight of testimony is upon that side.

(Bill of exceptions, p. 111, *supra*.)

Plaintiff states that the burden of establishing by a preponderance of the evidence the fact of agency is upon the party who relies upon the same to establish its case, to wit, the defendant in error.

VIII.

The court erred in refusing to give plaintiff's duly requested instruction as follows:

This is an action instituted by General Cigar Company Inc., a corporation, against First National Bank of Portland, Oregon, a National Banking corporation. It is admitted that both the plaintiff and defendant are incorporated as alleged.

There are several causes of action in the plaintiff's complaint and inasmuch as the answer to each and the reply to the answer involve precisely the same issues, I will simply take the first of these and you will understand that what I have to say as to the first applies with equal force to each of the others.

The General Cigar Company conducted a wholesale and retail cigar and tobacco business in the City of Portland, Oregon, and the same corporation had a branch at Spokane, Washington, engaged in a similar line of business. The Spokane branch being indebted to the Portland branch for

merchandise, issued its check payable to the General Cigar Company, Portland, Oregon, in the sum of \$1293.58. This check was drawn on the Spokane & Eastern Trust Co., a banking corporation of Spokane, Washington. The check was received at the Portland office and there was endorsed upon the check by rubber stamp endorsement the following:

“Pay to the order of First National Bank
 335 Portland, Oregon. 335
 General Cigar Company. Inc.
 M. A. Gunst Branch
 M. A. Gunst & Co.”

I instruct you that the effect of affixing such a stamp to the back of a check is to make the check payable to a special banking corporation, namely, the First National Bank of Portland, Oregon, and is a method of endorsement commonly utilized for purposes of deposit, and had been so utilized throughout the dealings of the General Cigar Company with the First National Bank.

It further appears that one Neil W. Turrell, Cashier of the General Cigar Co. had by virtue of a letter or power of attorney from the General Cigar Co. lodged with the First National Bank in July, 1919, been specifically authorized to sign checks on the funds of the General Cigar Co. or deposit with the First National Bank. Turrell took the Spokane check which I have described to you, endorsed as I have said to the defendant, First

National Bank, and the defendant, First National Bank, to which the check was made payable by endorsement, paid the face amount thereof in cash to the said Turrell, and then in turn collected the amount of the check from the bank on which it was drawn, that is, the Spokane & Eastern Trust Company at Spokane. It is admitted that the Bank did not credit the amount of the check to the General Cigar Company's account at Portland, Oregon, and that unless the bank had authority to pay the cash to Turrell and unless the payment to Turrell was in law and in fact a payment to the General Cigar Company, or unless you should find the bank is released from liability because of other matters to which I shall hereafter advert, the General Cigar Company has not been paid and the First National Bank is indebted to it in the amount of the check. Whether or not such liability exists is the question for you in this case, and it becomes necessary for me to explain to you how an agency is created, what authority an agent ordinarily has, and what are the respective rights and duties of the depositor and of the bank.

(Bill of exceptions, p. 112, *supra*.)

IX.

The court erred in failing to give plaintiff's duly requested instruction as follows:

I instruct you that when a negotiable instrument, such as the check in the case at bar, is endorsed specifically to a banking corporation, that

the party having physical possession of such a check has not from the possession of such check alone, any authority to negotiate the same or receive the proceeds thereof.

(Bill of exceptions, p. 115, *supra*.)

X.

The court erred in failing to give plaintiff's duly requested instruction as follows:

I instruct you that an agent has the authority which is actually, formally and expressly conferred upon him and the power necessary to carry his instructions into effect, and also such powers as he is held out by the principal to the world and to those dealing with him as having. The principal has a right to limit and define this authority and when he does so limit it, the agency for those particular purposes, at least, becomes a special agency, and all persons must have regard to the limitations imposed, and if they deal with the agent on such a special field of agency in any other way than the way prescribed by the principal, the principal is not ordinarily bound. In this case it is not disputed that there was conferred upon the agent, Turrel, by a letter or power of attorney, certain specific authority with reference to checks, i. e., the authority to sign checks on certain designated accounts and to sign these checks in a certain designated way, that is, as Cashier. That thereupon manner.

(Bill of exceptions, p. 115, *supra*.)

XI.

The court erred in failing to give plaintiff's duly requested instruction as follows:

I instruct you that the letter or power of attorney was silent on the subject of endorsements; that the rubber stamp endorsement making a check received by a depositor on an out of town bank payable to the order of the local bank in which he deposits, is one not required to be affixed by the principal himself or by any one holding any special powers and passes title to the fund to the depository bank alone. When the check is so stamped it became the bank's duty to the principal, the General Cigar Company, to decline to cash any checks on the funds of the depositor save and except those executed in the manner specified in the power of attorney, unless it has been shown to you that other or broader authority was conferred in some effective and is deposited with the bank to which it is made payable, by the rubber stamp endorsement, it is placed to the credit of the depositor and no question ordinarily arises as to the individual or the authority of the individual affixing the rubber stamp. (Bill of exceptions, p. 116, supra.)

XII.

The court erred in failing to give plaintiff's duly requested instruction as follows:

In this case it is claimed by the defendant bank that the rubber stamp which I have described was

used for another purpose than that of deposit, that is, that it was used for the purpose of obtaining cash over the counter and that Turrell, to whom I have referred, had authority from the plaintiff, General Cigar Co., to obtain through the use of said rubber stamp endorsement, cash from the defendant bank on checks received by the General Cigar Co. drawn on out of town banking institutions. I instruct you that the burden of proof is on the defendant, First National Bank, to show that Turrell had the authority which the bank claims. There is no presumption of such authority. Neither the letter of July, 1919, authorizing Turrell to sign checks, nor the fact that he or other employees could stamp out of town checks payable to the order of the First National Bank creates of itself any authority on Turrell to obtain cash on such facts and it is incumbent upon the defendant, First National Bank, seeking to justify payment of cash to Turrell thereon, to prove to you by a preponderance of evidence that Turrell had such authority.

In considering the question of whether or not such authority existed, you are not only entitled, but it is your duty to consider all the facts in testimony and the circumstances surrounding the parties and attending the transactions and to determine from such a consideration whether or not the bank has established Turrell's authority to cash said checks and the bank's right to pay them instead of placing them to the credit of its depositor, Gen-

eral Cigar Company. The bank can justify itself and prevent a recovery of this case only by proving that the money was placed to the credit of the General Cigar Company or was otherwise used for the benefit of the General Cigar Company, and, it being admitted that it was not credited to the General Cigar Company but was paid to Turrell, the bank must show that when it made a payment to Turrell, it was under Turrell's authority paying the money to the General Cigar Company. (Bill of exceptions, p. 117, supra.)

XIII.

The court erred in failing to give plaintiff's duly requested instruction as follows:

I instruct you that the letter or power of attorney of July, 1919, clearly required the signature for the General Cigar Company of two persons, Julius Louisson, the Manager, or Neil W. Turrell, Cashier, and that meant their signature in a representative capacity, as manager or cashier respectively, and not merely as individuals. There has been no testimony to show any authority to the bank or any practice or course of dealing between the parties which would justify the bank in paying out cash on a rubber stamp signature without the personal signature of either the manager or cashier as such, unless it can be said that the payment of the amount of the several checks involved in this case to Turrell created or constituted, because of

failure of the General Cigar Company, to object, such authority on the part of Turrell.
(Bill of exceptions, p. 118, *supra*.)

XIV.

The court erred in failing to give plaintiff's duly requested instruction as follows:

I instruct you that, in order for a person to be called upon to object to a wrongful or unauthorized course of practice it is necessary that he know the facts and know the practice, or that a reasonably prudent person or concern under similar circumstances would have had such knowledge in an ordinarily intelligent conduct of his or its affairs. The question therefore becomes one of fact for you to determine and the burden of proof in this regard is also upon the defendant, First National Bank, to show that the General Cigar Company, by giving in the matter of the Seattle and Spokane checks the attention and care which a reasonably prudent person under similar circumstances would have given them, would have discovered sooner than the General Cigar Company did discover, the method in which cash was withdrawn from the defendant bank on said out of town checks. The test in this regard is not what would have been discovered by the highest conceivable degree of care or by the investigation of a person abnormally suspicious, but only the care which an ordinarily prudent person or concern may reasonably be held

to be bound to devote to its business and affairs under similar circumstances.

(Bill of exceptions, p. 119, *supra*.)

XV.

The court erred in failing to give plaintiff's duly requested instruction as follows:

In considering the question submitted to you by the foregoing instructions, I instruct you that the checks which form the basis of this action and for which Turrell received cash from the First National Bank were drawn on out of town banks other than the defendant bank. The statements received monthly by the plaintiff from the defendant bank indicated only the state of the plaintiff's account with the defendant bank and did not tend to indicate the state of the accounts on which the checks in question were drawn. Therefore, from an examination of these statements alone, the wrongful acts of Turrell in question would not be shown to the plaintiff, nor could it thereby discover such wrongful acts of Turrell in cashing the checks in question. It would be necessary for the plaintiff to check its accounts with the books of the out of town branches and the accounts that such branches had with the banks with which they did business. It is for you to determine as a question of fact whether the plaintiff exercised reasonable care or was negligent in its system of checking the transactions between its Portland branch with the accounts from

the various other branches. It is to be observed by you that the checks returned to the Spokane Branch by the Spokane bank of deposit and to the Seattle branch by the Seattle bank of deposit, would not present any reason to believe that an irregularity had occurred since the Spokane and Seattle banks had a right, when receiving the checks through the First National Bank of Portland, with the approved rubber stamp endorsement of the General Cigar Company at Portland to the order of the First National Bank, to assume that these had passed through the hands of the First National Bank in a regular, proper and orderly manner and the Spokane and Seattle banks had the right to charge the amount of these checks against their respective depositors at those points.

(Bill of exceptions, p. 120, *supra*.)

XVI.

The court erred in failing to give plaintiff's duly requested instruction as follows:

The defendant bank as one of its defenses in this case asserts that the plaintiff, General Cigar Company, knew of the course of conduct on the part of Turrell with reference to the checks in suit, for a long time prior to communicating that knowledge to the defendant bank, and that the bank was thereby deprived of an opportunity to recover all or a part of the loss. I instruct you that by facts stipulated in this case, it appears that all of Tur-

rell's property was attached by the General Cigar Company at a time when it knew only of Turrell's embezzlement by means of checks payable to cash, not involved in this action, and that shortly thereafter the property so attached and all of Turrell's property acquired during the period of defalcation, was turned over to one J. H. Tipton as Trustee and that the question of the application of the proceeds of said property is one of law upon which this court will pass, the facts being admitted and it affirmatively appears from such admitted facts that no harm has resulted to the First National Bank by reason of any such alleged delay. I instruct you, therefore, to disregard the third further and separate defense on the subject of loss to the bank through alleged delay in notifying it of the claim which is the subject of this action.

(Bill of exceptions, p. 122, supra.)

XVII.

The court erred in failing to give plaintiff's duly requested instruction as follows, which instruction plaintiff requested in case the instruction set forth in the preceding assignment of error was refused.

One of the defenses advanced by the defendant bank is that the plaintiff delayed unreasonably in informing it of the course of conduct on the part of Turrell with reference to the checks in suit. It was the duty of the plaintiff, General Cigar Company, within a reasonable time after ascertaining

the facts, to communicate them to the bank. The General Cigar Company had the right to make such inquiry as was necessary to ascertain the facts and was charged with the duty of making such inquiry with diligence. It would not be required to give notice as to the amounts claimed to have been diverted until, as a result of diligent inquiry, it had the opportunity to know them itself. In order to sustain this defense on the part of the bank, therefore, it must appear to you from a ponderance of the evidence that the General Cigar Company, after having reason to suspect the facts in connection with the checks in suit, delayed unreasonably in compiling the data on the subject and in communicating the result of its investigation and inquiry to the First National Bank. If you believe that the first intimation on the subject came from Turrell's confession at the end of May, 1921, and that the wires were used in the effort to ascertain the facts and that copies of documents had to be procured from the various banks and an accounting and audit were essential, and that the data could not reasonably be compiled short of June 20th, at which date the bank was given formal notice of the amount of the several checks, then I instruct you that the General Cigar Company acted with reasonable diligence and the bank cannot avoid liability under that defense.

(Bill of exceptions, p. 123, *supra*.)

XVIII.

The court erred in denying plaintiff's motion for a new trial on the ground of errors at law occurring at the trial and duly excepted by the plaintiff, the errors assigned being the rulings to which assignments of error III to XVII were taken, as above stated, and on the following ground:

"That the verdict is not in accordance with the weight of evidence in that the evidence required at the jury's hands a finding in favor of the plaintiff on cause of action arising before the rendering of any monthly statements or before the theory of estoppel could be invoked because of failure to ascertain the facts as to Turrell's conduct and to act on such information."

WHEREFORE, plaintiff prays that the said judgment be reversed and that said cause be remanded to the Honorable District Court of the United States, for the District of Oregon, for a new trial, and that plaintiff in error recover its costs and disbursements on this review.

DEY, HAMPSON & NELSON,
GEO. L. BULAND,

Attorneys for Plaintiff.

Due service of the foregoing assignment of errors is hereby accepted at Portland, Oregon, this 17th day of November, 1922.

DOLPH, MALLORY, SIMON & GEARIN,
EDGAR FREED,

Attorneys for Defendant.

On the 23rd day of November, 1922, there was duly made and entered the following

**ORDER ALLOWING WRIT OF ERROR
AND FIXING AMOUNT OF BOND**

On this 23rd day of November, 1922, came plaintiff and filed herein and presented to this court its petition praying for the allowance of writ of error, and therewith its assignment of errors intended to be urged by it, and also praying that the amount of the supersedeas bond to be given by it be fixed, and that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof, it is **ORDERED** that said writ of error be and the same is hereby allowed, as prayed for, upon the plaintiff giving a bond as provided by law in the penal sum of **FIVE HUNDRED DOLLARS**, and that further proceedings in said cause in this court be suspended pending the determination of said writ of error by the United States Circuit Court of Appeals, for the Ninth Circuit.

CHAS. E. WOLVERTON,
District Judge.

That on said day there was filed in said court the following

**BOND ON WRIT OF ERROR
KNOW ALL MEN BY THESE PRESENTS,**

that **GENERAL CIGAR COMPANY**, corporation, as principal, and **UNITED STATES FIDELITY & GUARANTY COMPANY**, a Maryland corporation, as surety, are held and firmly bound unto the First National Bank of Portland, Oregon, defendant herein, in the sum of **FIVE HUNDRED DOLLARS**, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally by these presents.

WHEREAS, lately at a regular term of the District Court of the United States, for the District of Oregon, sitting at Portland in said district, in an action pending in said court between General Cigar Company, a corporation, as plaintiff, and First National Bank of Portland, Oregon, as defendant, on the law docket of said court, final judgment was rendered against the said General Cigar Company that it take nothing by its complaint therein, and in favor of said defendant for the sum of \$35.92, and the said General Cigar Company has obtained a writ of error to reverse said judgment, and a citation directed to the First National Bank of Portland, Oregon, defendant in error, citing it to be and appear before the United States Circuit Court of Appeals, for the Ninth Circuit, at San Francisco, in the State of California, within thirty days from the date of the service said citation.

Now the condition of the above obligation is such that if the said General Cigar Company shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obli-

gation to be void, else to remain in full force and effect.

IN WITNESS WHEREOF, General Cigar Company, a corporation, has caused these presents to be executed by its duly authorized agent, and the said surety has likewise caused these presents to be executed by its duly authorized attorney in fact this 23rd day of November, 1922.

GENERAL CIGAR COMPANY,

By Roscoe C. Nelson,
Attorney in Fact.

UNITED STATES FIDELITY &
GUARANTY COMPANY,

By Douglas R. Tate,
Attorney in Fact.

Service of the within bond by receipt of a duly certified copy thereof is accepted at Portland, Oregon, this 23rd day of November, 1922.

DOLPH, MALLORY, SIMON & GEARIN,
EDGAR FREED,

Attorneys for Defendant.

On November 23rd, 1922, there was issued the following Writ of Error:

In the United States Circuit Court of Appeals for the Ninth Circuit.

GENERAL CIGAR COMPANY, a
corporation

Plaintiff in Error,

vs.

Writ of Error.

FIRST NATIONAL BANK OF PORTLAND,
Oregon, a National Banking corporation,
Defendant in Error.

THE UNITED STATES OF AMERICA, ss.
THE PRESIDENT OF THE UNITED
STATES OF AMERICA.

To the Judge of the District Court of the United States
for the District of Oregon:

GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable CHARLES E. WOLVERTON, one of you, between GENERAL CIGAR COMPANY, a corp., Plaintiff and Plaintiff in Error, and FIRST NATIONAL BANK OF PORTLAND, Ore., Defendant and Defendant in Error, a manifest error hath happened to the great damage of the said Plaintiff in Error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held;

that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the HONORABLE WILLIAM
HOWARD TAFT,

Chief Justice of the Supreme Court of the
United States this 23rd day of November,
1922.

G. H. MARSH,
Clerk of the District Court of the United
States for the District of Oregon.

By F. L. Buck, Deputy.

And on the 24th day of November, 1922, there was filed in said court, the following

CITATION ON WRIT OF ERROR
UNITED STATES OF AMERICA,
STATE AND DISTRICT OF OREGON,—ss.
TO FIRST NATIONAL BANK OF PORT-
LAND, OREGON, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be held in the City of San Francisco, in the State of California, within thirty days from the 23rd day of November, 1922, pursuant to a writ of error on file in the office of the clerk of the District Court of the United States, for the District of Oregon,

in that certain action wherein General Cigar Company, a corporation, is plaintiff, and you, First National Bank of Portland, Oregon, is defendant in error, to show cause, if any there be, why the judgment given, made and entered in favor of the said First National Bank of Portland, Oregon, in the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Charles E. Wolverton, United States District Judge for the District of Oregon, this 23rd day of November, 1922.

CHARLES E. WOLVERTON,
District Judge.

Service of the foregoing citation by receipt of duly certified copy thereof is hereby accepted for defendant at Portland, Oregon, this 24th day of November, 1922.

DOLPH, MALLORY, SIMON & GEARIN,
EDGAR A. FREED,

Attorneys for Defendant.

On December 8, 1922, there was filed the following

STIPULATION

IT IS HEREBY STIPULATED AND AGREED between the parties hereto by their respective attorneys, as follows:

I.

That the Transcript of Record on Writ of Error in said cause shall consist of the following:

Complaint.

Demurrer.

Opinion of Court Thereon.

Order Denying Demurrer.

Answer.

Demurrer to Answer.

Order Allowing Withdrawal of Demurrer in Part.

Opinion on Demurrer.

Order Overruling Demurrer.

Reply.

Judgment Order.

Order Extending Time for Filing Motion for New Trial.

Notice of Presentation of Motion for New Trial.

Notice of Intention to Move for New Trial.

Order Denying Motion for New Trial.

Order Extending Time for Filing Bill of Exceptions.

Order Extending Time for Filing Bill of Exceptions.

Bill of Exceptions.

Petition for Writ of Error.

Assignment of Error.

Order allowing Writ of Error and Fixing Amount of Bond.

Bond on Writ of Error.

Writ of Error.

Citation.

This Stipulation.

Clerk's Certificate.

II.

It is further Stipulated and Agreed in this connection that all pleadings relating to the Seventh and Eighth causes of Action may be omitted from the Transcript of Record; that only so much of Defendant's Answer as relates to the first cause of action need be printed in said Transcript of Record and it is hereby stipulated and agreed that the same denials, admissions and allegations were made in respect to the remaining causes of action as were made to the first cause of action, with the exception of such variations as were made appropriate by the varying dates and amounts of the checks concerned; that only so much of Plaintiff's Reply to Defendant's Answer need be printed in said Transcript of Record as relates to Defendant's Answer to said first cause of action, it being stipulated and agreed that Plaintiff's Reply to Defendant's Answers to the various other causes of action contain the same admissions, denials and affirmative allegations as the Reply to Defendant's answer to Plaintiff's first cause of action, with such variation as are rendered necessary and appropriate by reason of the variation in dates and amounts of the checks concerned.

III.

That in printing said Transcript of Record, the caption, title and clerk's endorsement of filing of papers and other formal matters may be omitted.

IV.

Attorneys for Plaintiff in Error herein having prepared and compared with the original record the within printed Transcript.

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and between the parties to the within proceedings for WRIT OF ERROR by and through their respective attorneys, that the within printed record tendered to the Clerk of the United States District Court for the District of Oregon for his certificate is a true Transcript of the record in the within cause and that the Clerk of the said Court shall certify the said printed Transcript without comparison thereof with the original record.

V.

That an order may be entered herein, on the application of Plaintiff in Error, enlarging the time within which to file the record and docket the above entitled cause with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, to and inclusive of the 1st day of January, 1923.

DATED at Portland, Oregon, DECEMBER 8, 1922.

DEY, HAMPSON & NELSON,
GEO. L. BULAND,
Attorneys for Plaintiff in Error.

DOLPH, MALLORY, SIMON & GEARIN,
EDGAR FREED,
Attorneys for Defendant in Error.

IN THE DISTRICT COURT OF THE UNITED
STATES, FOR THE DISTRICT OF OREGON
GENERAL CIGAR COMPANY, a

corporation,

Plaintiff,

vs.

FIRST NATIONAL BANK OF
PORTLAND, Oregon, a National
Banking corporation,

Defendant.

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD

United States of America,
District of Oregon,—ss.

The attorneys for the respective parties to the within proceedings having stipulated that the within printed Transcript of Record, as prepared, compared and tendered to me for certification by the attorneys for the Plaintiff in Error, is a true Transcript of the Record in this cause in that I shall certify the same without comparison.

NOW, THEREFORE, in accordance with the said Stipulation, I, G. H. MARSH, Clerk of the above entitled Court, do hereby certify that the foregoing Transcript of Record upon Writ of Error in the case in which GENERAL CIGAR COMPANY, a corporation, is Plaintiff and Plaintiff in Error, and FIRST NATIONAL BANK OF PORTLAND, Oregon, a Na-

tional Banking corporation is Defendant and Defendant in Error, is a full, true and correct Transcript of the Record and proceedings had in said court in said cause as the same appear of record and on file at my office and in my custody, the same having been prepared by attorneys for Plaintiff in Error.

And I further certify that the fee for certifying to the within Transcript has been paid by the said Plaintiffs in Error.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Portland, in said District this —— day of December, 1922.

G. H. MARSH,
Clerk.